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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ AND
ROBERT SORTGESE HAMPARIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the authority granted Customs officers by 19 U.S.C. 1581 and 46 U.S.C. 277 to board vessels on inland waters for the purpose of inspecting the vessels' documents violates the Fourth Amendment whenever the boarding is made without a reasonable suspicion of a violation of law.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a), is reported at 652 F.2d 481. The oral ruling of the district court on respondents' motion to suppress (App. B, *infra*, 17a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 21a-22a) was entered on August 3, 1981. A petition for rehearing was denied on October 19, 1981 (App. D, *infra*, 23a-24a). Justice White ex-

tended the time for filing a petition for a writ of certiorari to and including January 17, 1982 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 1581(a) provides:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. 1701 et seq.], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. 1581(b) provides:

> Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters

and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue any person engaged in the breach or violation of the navigation laws.

46 U.S.C. 277 provides:

> Any officer concerned in the collection of the revenue may at all times inspect the register or enrollment or license of any vessel or any document in lieu thereof; and if the master or other person in charge or command of any such vessel shall not exhibit the same, when required by such officer, unless the vessel is one which by regulation of the Secretary of the Treasury is not required to have its register or enrollment or license or document in lieu thereof on board, such master or person in charge or command shall be liable to a penalty of $100, unless the failure to do so is willful, in which case he shall be liable to a penalty of $1,000 and to a fine of not more than $1,000 or imprisonment for not more than one year, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, respondents were convicted of importation of marijuana, in violation of 21 U.S.C. 952(a), possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit each of those offenses, in violation of 21 U.S.C. 846 and 963. Respondents were sentenced to consecutive terms of five years' imprisonment on each of the two substantive counts and to concurrent terms of five years' imprisonment on each of the two conspiracy counts.

1. Prior to trial, respondents moved to suppress approximately 5,800 pounds of marijuana seized by Customs officers following a boarding of respondents' vessel. The pertinent evidence, which is summarized in the opinion of the court of appeals (App. A, *infra*, 2a-5a), showed that on the evening of March 5, 1980, a Customs officer received information from a reliable informant that two vessels loaded with marijuana and manned by persons speaking a foreign language were in the vicinity of Hackberry and Cameron, Louisiana (H. Tr. 6-7).[1] Both Hackberry and Cameron are small fishing villages located on the Calcasieu River Ship Channel, a waterway that runs from the Gulf of Mexico to Lake Charles, Louisiana. Lake Charles, which is located about 50 land miles from the entrance to the ship channel near Cameron (H. Tr. 43), is designated as a Customs port of entry in the Houston, Texas region (see 19 C.F.R. 101.3). All vessels coming from foreign waters and headed for the Customs house at Lake Charles must traverse the Calcasieu River Ship Channel (H. Tr. 97-98).

As a result of the informant's tip, Customs officers, aided by officers of the Louisiana Department of Wildlife and Fisheries, began a land and water patrol of the area (H. Tr. 71-72). Shortly after midnight, in a nearby intracoastal waterway, the officers discovered a small boat running without lights in violation of navigation laws (H. Tr. 15-16, 73). The gasoline-powered boat was carrying some new tarpaulins, a walkie-talkie radio, and three new five-gallon fuel cans, two of which contained diesel fuel (H. Tr. 17-18, 74). Although the operator of the boat claimed to be going fishing, no fishing gear was observed on the boat (H. Tr. 18).

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[1] "H. Tr." refers to the suppression hearing transcript.

Later that morning (March 6, 1980), Customs Officer Loren Wilkins and state law enforcement officers resumed their patrol on the Calcasieu River Ship Channel (H. Tr. 76-77). At about 11:30 a.m., the officers observed a large sailboat anchored on the west side of the ship channel, approximately 18 miles inland from the coast (H. Tr. 26-27, 77). Wilkins had never before seen a sailboat in the ship channel (H. Tr. 77-78). As the patrol boat proceeded in the direction of the sailboat, the officers observed a large freighter heading north up the channel, toward the Port of Lake Charles, creating a huge wake that caused the sailboat to rock so violently from side to side that the officers believed it was about to capsize (H. Tr. 27-29, 78-79). As the patrol boat passed behind the sailboat, the officers observed on the stern of the vessel the name "*Henry Morgan II*" and the home port "Basilea," which Wilkins believed to be a foreign port (H. Tr. 29, 79,).[2] Officer Wilkins then observed an individual on the deck of the sailboat. In a loud voice, Wilkins asked the man, later identified as respondent Hamparian, if he was all right. Hamparian merely shrugged his shoulders and lifted his hands without responding (H. Tr. 30-32, 79-82). Based on the vessel's designated home port, the apparent inability of the person on board (respondent Hamparian) to understand English, and the unusual location of the vessel, Officer Wilkins believed that the sailboat was foreign, and he decided to board the boat to check its documentation (H. Tr. 82, 112-113). Wilkins sought to ascertain whether the sailboat in fact was of foreign registry or had come from

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[2] "Basilea" is the Latin translation for Basel, Switzerland. *Lippincott Gazeteer of the World* 171 (A. & L. Heilprin ed. 1931).

foreign waters and, if so, whether it had reported to Customs (H. Tr. 103).

After the patrol boat maneuvered into position alongside the *Henry Morgan II*, Wilkins displayed his badge to respondent Hamparian, identified himself as a Customs officer, and boarded the boat, accompanied by state police officer Dougherty (H. Tr. 35, 56, 84). In response to Wilkins' request for the boat's papers, respondent Hamparian produced a document, written in French and dated February 6, 1980, that appeared to be a request to change the registration of a vessel from Swiss to French registry (App. A, *infra*, 4a). While talking to respondent Hamparian, Wilkins detected the odor of burning marijuana and asked if Dougherty also smelled it (H. Tr. 38-39, 86-87). After Dougherty responded in the affirmative, Wilkins looked through an open door hatch and observed numerous burlap-wrapped bales (H. Tr. 39-40, 87). Respondent Villamonte-Marquez was lying on a sleeping bag on top of the bales (H. Tr. 60-63). Respondents were arrested, and a total of approximately 5,800 pounds of marijuana was found on board the vessel.

The district court denied respondents' motion to suppress, concluding that the boarding of the sailboat to check its documents was justified because the facts known to Officer Wilkins gave rise to reasonable suspicion of a customs violation (App. B, *infra*, 19a-20a). The court further concluded that the odor of marijuana detected by the officers once they were lawfully on board provided probable cause to search the vessel (*id.* at 20a).

2. The court of appeals reversed (App. A, *infra*, 1a-16a). The court acknowledged (*id.* at 6a) that 19 U.S.C 1581(a) provides Customs officers with

broad authority to "go on board any vessel * * * at any place in the United States or within the customs waters * * * [to] examine the manifest and other documents and papers." However, the court held that a Customs boarding of a vessel on inland waters[3] pursuant to Section 1581(a), for the purpose of checking the vessel's documents, violates the Fourth Amendment unless the boarding is justifiable either under a border search rationale or as an "investi-

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[3] International law recognizes essentially four types of waters, each subject to varying degrees of control by nations. On inland waters, which include rivers, harbors, bays and other waters landward of the coastline, a nation may enforce its laws exactly as on land. Moving seaward, the next category is the "territorial sea," which the United States recognizes as those waters within three nautical miles of the coast. See *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122-123 (1923). In territorial seas, the nation may enforce its laws just as it does on land and on inland waters, except that it must grant foreign vessels the right of friendly passage; once inside the territorial sea, however, those vessels are wholly subject to United States law. *Id.* at 124-125. The high seas lie seaward of the territorial sea and thus encompass the "contiguous zone," which in the United States includes the waters between the three mile territorial limit and a line extending 12 nautical miles from the coast; the entire area within the 12-mile limit is referred to as "customs waters." See 19 U.S.C. 1401(j). The power of the United States over foreign vessels in the contiguous zone is limited to the preservation of specific interests, such as enforcement of customs and safety laws. Finally, the seas beyond the contiguous zone are international waters, which are subject to the sovereignty of no nation. However, each nation may assert full jurisdiction on international waters over vessels that it has registered. See generally *United States* v. *Warren*, 578 F.2d 1058, 1064-1065 n.4 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980); *United States* v. *Williams*, 617 F.2d 1063, 1073 n.6 (5th Cir. 1980) (en banc).

gatory stop" based on reasonable suspicion of illegal activity (*id.* at 9a). The court concluded that the boarding could not be upheld as a border search because, in the court's view, at the time of the boarding, which took place 18 miles inland (but still some 30 miles seaward of the port of entry at Lake Charles), the officers had no reason to believe that the vessel had crossed the border (*id.* at 10a-12a). Turning to the question whether the boarding was supported by reasonable suspicion, the court of appeals concluded that "[n]one of the 'articulable facts' cited by the district court even arguably support[s] the required reasonable suspicion of law violation" (*id.* at 13a).[4] After analyzing each of these facts separately, the court determined that "[t]he facts could support nothing more than a generalized suspicion and speculation in the minds of the officers"

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[4] The five facts on which the district court relied in support of its finding of reasonable suspicion were (App. B, *infra*, 19a-20a; see App. A, *infra*, 12a-13a):

(1) the information from a reliable informant that two boats with foreigners would be in the Hackberry-Cameron area with marijuana on board;

(2) the discovery of the small, gasoline-powered boat operating without running lights and carrying cans containing diesel fuel;

(3) the sighting of the *Henry Morgan II* in the ship channel where the officers had never before seen a sailing vessel anchored;

(4) the name of the sailboat's home port appeared to be foreign;

(5) respondent Hamparian's actions in shrugging his shoulders and failing to speak in response to Officer Wilkin's question indicated that Hamparian did not understand the question and might have been a foreigner.

(*id.* at 16a), and it accordingly held that the boarding of the vessel was unreasonable under the Fourth Amendment.

REASONS FOR GRANTING THE PETITION

1. This case presents an important question concerning the validity, under the Fourth Amendment, of Customs' statutorily authorized practice of boarding vessels on inland waters, in the absence of reasonable suspicion of a violation of law, to check the vessel's documentation. A majority of Customs boardings of vessels take place on inland waters (see note 8, *infra*); moreover, a large proportion of Customs' enforcement resources are concentrated in the regions encompassed by the Fifth and Eleventh Circuits.[5] Unless overturned, the court of appeals' holding that, absent particularized information of a recent border crossing sufficient to justify a border search, Customs officers must possess reasonable suspicion that the vessel or its crew are violating the law before they may board for the purpose of document inspections would seriously impair the ability of the Customs Service to fulfill its enforcement responsibilities on the nation's inland waterways and to police traffic across its borders.

The decision of the court of appeals proceeds from a serious misapprehension of the scope of the Customs Service's enforcement responsibilities and creates unreasonable obstacles to the successful discharge of those responsibilities. Customs has of course traditionally been charged with the task of policing our coasts to collect and protect the revenue and to prevent the importation of contraband. See 19 U.S.C. 1433-1435, 1441; 46 U.S.C. 91, 104, 107,

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[5] The Eleventh Circuit has held that it will follow Fifth Circuit precedent. See *Bonner* v. *City of Prichard*, 661 F.2d 1206 (1981) (en banc).

313, 314. Because of the numerous entrances to this country's harbors and ports—many of which, like Lake Charles, are located on rivers or bays many miles from the coast or border—it is virtually impossible for Customs to perform this function unless its officers are permitted to board vessels on waterways leading inland from the coast in order to determine whether the vessels have come from international waters.

In addition to its function of policing the coastline and protecting the revenue, Customs historically has had the responsibility of insuring the proper documentation of all American vessels of a certain size and class. See 46 U.S.C. 11 *et seq.*; 46 U.S.C. 251 *et seq.* "Documentation" refers to the administrative procedure by which a vessel is registered or licensed as a vessel of the United States for identification purposes and certified as authorized to engage in a specific trade. In order to enforce compliance with the documentation laws, Customs officers have been authorized since the earliest years of the Republic "at all times" to "inspect the register or enrollment or license of any vessel * * *." 46 U.S.C. 277. Enforcement of the documentation requirements would be frustrated if the broad statutory boarding authority is invalidated except in cases of reasonable suspicion of documentation violations, because it is highly unlikely that Customs officers will be aware of specific facts amounting to a reasonable suspicion that a particular vessel's documents are not in order. See pages 20-21, *infra*.

In light of this background, and contrary to the conclusion of the court of appeals, the reasonableness of a Customs boarding of a vessel on inland waters for a routine document check should not depend on whether the boarding qualifies as either a

border search or an investigatory stop.[6] Federal regulation and inspection of foreign and domestic vessels dates back to legislation enacted by the First Congress in 1789 and 1790. Given the long history and pervasive nature of federal regulation of both commercial and pleasure vessels on the nation's waters, a person on board a vessel that is subject to Customs boarding for a document inspection under 19 U.S.C. 1581(a) has no legitimate expectation of freedom from such inspections. This is especially true with respect to vessels that are or appear to be of foreign registry and with respect to vessels situated in waters leading from the coast to a customs port of entry.

In sum, the governmental interests served by Customs' practice of conducting routine boardings on inland waters to check the documents of vessels subject to federal regulation outweigh the minimal intrusion

[6] Although we do not agree with the court of appeals' determination that the boarding officers lacked reasonable suspicion of a law violation prior to boarding the vessel, we do not seek review of that fact-specific ruling. That ruling, however, underscores the problems that the Customs Service will face in satisfying the Fifth Circuit's test for upholding boardings on inland waters. The court's treatment of the reasonable suspicion issue (App. A, *infra*, 12a-16a)—examining each element of information in isolation without regard to its connection with other pieces of information or to the officers' experience—is plainly contrary to the approach mandated by *United States* v. *Cortez*, 449 U.S. 411 (1981). Similarly, while we do not challenge the court of appeals' ruling that on the particular facts of this case there was not a sufficient basis prior to boarding to conclude that the *Henry Morgan II* had recently crossed the border and was therefore subject to a border search, the reasonableness of Customs boardings for the limited purpose of checking a vessel's documentation (which may disclose whether a border search is in fact justified) turns on many of the same important considerations that justify border searches. The court of appeals' analysis simply ignored these considerations. See pages 13-15, 18-19, 20, *infra*.

on privacy entailed by such boardings. The decision below errs in uncritically superimposing on stops of nautical vessels Fourth Amendment principles applicable to stops of land-based vehicles.

a. Under 19 U.S.C. 1581(a), Customs officers are authorized to board any vessel "at any time" and "at any place in the United States or within the customs waters" for the purpose of "examin[ing] the manifest and other documents and papers." The court of appeals did not question that Customs Officer Wilkins was authorized to board the *Henry Morgan II* by Section 1581(a). Similarly, the court did not question "the existence of probable cause and exigent circumstances to justify a warrantless search of the vessel once the officers had boarded it and smelled marijuana" (App. A, infra, 10a). The only issue addressed by the court below is whether the statutorily authorized boarding was reasonable under the Fourth Amendment.

In numerous cases, the Fifth Circuit and other courts of appeals have upheld suspicionless Coast Guard boardings of American vessels on the high seas for the purpose of conducting document and safety inspections pursuant to 14 U.S.C. 89(a). See, *e.g.*, *United States* v. *DeWeese*, 632 F.2d 1267 (5th Cir. 1980), cert. denied, No. 80-1893 (Oct. 5, 1981); *United States* v. *Hilton*, 619 F.2d 127 (1st Cir.), cert. denied, 449 U.S. 887 (1980); *United States* v. *Harper*, 617 F.2d 35 (4th Cir.), cert. denied, 449 U.S. 887 (1980); *United States* v. *Erwin*, 602 F.2d 1183 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980); *United States* v. *Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). In addition, the Fifth Circuit has held that Customs officers may board vessels in customs waters for document checks under 19 U.S.C. 1581(a) in the absence of reasonable suspicion. See *United*

States v. *Postal*, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *United States* v. *Freeman*, 579 F.2d 942 (5th Cir. 1978). Furthermore, in *United States* v. *Whitaker*, 592 F.2d 826 (5th Cir. 1979), the Fifth Circuit upheld the suspicionless stop and boarding by Customs officers of a vessel initially sighted within customs waters but not actually boarded until it had entered inland waters.[7] The court of appeals in this case made no effort to explain its departure from these decisions by imposing a reasonable suspicion requirement with regard to Customs boardings of vessels on inland waters.[8]

b. The court of appeals also ignored the long history and pervasive nature of federal regulation and inspection of vessels on the nation's waters. In *United States* v. *Ramsey*, 431 U.S. 606, 616 (1977), this Court observed that the same Congress that proposed the Bill of Rights, including the Fourth Amendment, enacted the nation's first customs statute, Act of July 31, 1789, ch.5, 1 Stat. 29. Section 5

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[7] In *United States* v. *Williams*, 544 F.2d 807 (5th Cir. 1977), the court held that the suspicionless boarding by Customs officers of a small, probably unseaworthy houseboat that was tied to a dock on inland waters was unreasonable and could not be justified under 19 U.S.C. 1581(a). The court noted, however, that Customs may generally conduct suspicionless boardings under Section 1581(a) of "certain vessels presumed to bear persons or cargo subject to customs enforcement procedures." 544 F.2d at 811.

[8] We note that the number of Customs boardings of vessels on inland waters far exceeds the number of Customs boardings in customs waters. In 1980 and 1981, Customs officers conducted a total of 4,424 boardings on inland waters while making only 1,465 boardings in customs waters. In the Houston Region, which includes the Calcasieu River Ship Channel, Customs conducted 264 inland waters boardings and 17 customs waters boardings during this period.

of the Act authorized Customs officers to go on board all ships or vessels arriving in their districts. 1 Stat. 37. The Act also required masters to deliver manifects to "any officer who shall first come on board his ship or vessel" (Section 10, 1 Stat. 38), and to make entry and deliver documents to Customs officers when their vessel arrived in any port or district of the United States *"or in any of the creeks or harbours thereof"* (Section 11, 1 Stat. 38) (emphasis added). While the first customs statute appears to have been directed to vessels believed to be arriving from foreign countries, or carrying imported merchandise, the reach of Customs' authority was soon expanded to domestic as well as international navigation. In the Act of Sept. 1, 1789, ch.11, 1 Stat. 55, Congress established a system of documentation for American vessels and regulated the movement of vessels between ports in the United States. Section 22 of the Act required domestic vessels over 20 tons to be enrolled and licensed and vessels over five tons to be licensed by the collector of Customs. 1 Stat. 60-61. Owners were required to paint the vessel's name and home port on the stern, a practice that is still required (46 U.S.C. 46, 103).

Shortly thereafter, Congress enacted the predecessor of 19 U.S.C. 1581(a). Section 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 164, authorized Customs officers and officers of revenue cutters to board all ships or vessels in "any part of the United States, or within four leagues of the coast thereof, if bound for the United States, whether in or out of their respective districts, for the purposes of examining the manifests * * * and of examining and searching" the vessels. The authority to board a vessel pursuant

to this statute did not depend on the existence of suspicion of any criminal activity.[9]

As the Court reiterated in *United States* v. *Ramsey*, *supra*, 431 U.S. at 616-617, "[t]he historical importance of the enactment of [these] customs statute[s] by the same Congress which proposed the Fourth Amendment is * * * manifest." The statutes clearly indicate that Congress "did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). See *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76 (1970); *United States* v. *Ramsey*, *supra*, 431 U.S. at 617.

In 1793, Congress enacted a comprehensive statute that established the basic framework for federal regulation of vessel documentation, which remains in effect today. Act of Feb. 18, 1793, ch.8, 1 Stat. 305. Section 13 of that Act, the predecessor to 46 U.S.C. 277, authorized Customs officers "at all times * * * to inspect the enrollment or license of any ship or vessel" and established penalties for the failure to produce such documentation when required by the Customs officers. 1 Stat.

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[9] Indeed, in discussing the first paragraph of Section 581 of the Act of Sept. 21, 1922, ch. 356, 42 Stat. 979, a more recent predecessor of 19 U.S.C. 1581(a), Justices Brandeis and Holmes observed:

> The primary purpose of that paragraph was not to provide for the seizure of American vessels of known or suspected guilt. It was to facilitate, by means of boarding and examination of the manifest before arrival in port, both the entry of admittedly innocent vessels and the collection of revenues.

Maul v. *United States*, 274 U.S. 501, 529 (1927) (Brandeis and Holmes, J.J., concurring).

309. Section 27 authorized any Customs officer "to go on board any ship or vessel," within or without his district, to inspect, search and examine the vessel, and to seize the vessel upon finding any violation of the laws subjecting the vessel or its contents to forfeiture. 1 Stat. 315.

Thus, since the beginning of the Republic, Congress has considered Customs boardings of vessels for document inspections to comport with Fourth Amendment standards, even in the absence of any suspicion of illegal conduct. Because of the long history of close federal supervision and inspection in this area, individuals on board vessels that are subject to Customs regulation have no reasonable expectation of freedom from Customs boardings pursuant to Section 1581(a). See *Colonnade Catering Corp.* v. *United States, supra; United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Such individuals have voluntarily chosen to subject themselves to the full arsenal of governmental regulation and have in effect consented to the incidental restrictions—including boardings for document checks—that such regulation entails.[10]

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[10] Certainly, respondents could have entertained no reasonable expectation of freedom from Customs boardings to check the vessel's documents. They knew that the *Henry Morgan II* was a vessel of foreign registry and that it had arrived from a foreign country. They knew or should have known that their vessel was subject to Customs boarding and inspection upon its arrival in United States waters. See page 9, *supra*.

Even if the *Henry Morgan II* had been a documented American vessel, respondents could not reasonably have ex-

c. In imposing a reasonable suspicion requirement on Customs boardings of vessels on inland waters, the court of appeals relied (App. A, *infra*, 7a) on this Court's decision in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). That case held that Border Patrol officers on roving patrol at locations away from the border or its functional equivalents may stop vehicles only if they have reasonable suspicion that the vehicles contain illegal aliens or contraband. In *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979), this Court similarly concluded that a police officer may not make a random stop of an automobile for a license and registration check absent reasonable suspicion of a license or registration violation or of some other violation of law.

We submit that the standards of *Prouse* and *Brignoni-Ponce* have no proper application to boardings of vessels by Customs officials. In *Prouse* the Court reiterated that the purpose of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials * * *." 440 U.S. at 653-654 (footnote omitted). And, in assessing the reasonableness of random automobile stops without cause or suspicion, the Court gave considerable weight to the "basic, pervasive and often necessary" role of automobile travel in American life (*id.* at 662); it also noted that other methods of spot checks, such as roadblocks, might be

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pected to be free from Customs regulation and inspection. Under 46 U.S.C. 277, the master of documented American vessels is required, on pain of fine and imprisonment, to exhibit the vessel's documentation papers to Customs officers whenever requested to do so. The authority of Customs officers to board vessels in inland or customs waters extends to pleasure as well as commercial vessels. See *The Atlantic*, 68 F.2d 8, 9-10 (2d Cir. 1933).

alternatives to the random stops of automobiles that could with equal effectiveness serve the regulatory purposes advanced to justify random stops. *Id.* at 663.

Contrary to the decision below, this analysis cannot be uncritically superimposed on stops of nautical vessels. Instead, the court of appeals should have undertaken an independent inquiry to determine whether the intrusion on individual Fourth Amendment privacy interests entailed by the particular law enforcement practice in question is outweighed by the promotion of legitimate governmental interests. See, *e.g.*, *Delaware* v. *Prouse*, *supra*, 440 U.S. at 654; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878.

The principal government interest involved in Customs boarding of vessels

> lies in executing congressional determinations under its "plenary powers" to regulate commerce with foreign nations. But the revenue and regulatory concerns of Congress in this area are not exhausted by application to vessels known for a certainty to have come directly from foreign ports. There is a valid governmental interest in determining whether a boat has come from abroad or whether it contains secreted dutiable goods. Moreover, the interest in monitoring exports also may necessitate inspections of vessels in the absence of border crossing facts.
>
> In addition to customs concerns, some interference with boats is also warranted by the national interests in regulating vessels that fly the American flag and in ensuring orderly travel under the navigation laws. Unlike border patrol agents, customs officers in patrolling our inter-

> coastal and customs waters customarily enforce such laws and coast guard regulations under authority shared with other law enforcement agencies.

United States v. *Whitmire*, 595 F.2d 1303, 1313-1314 (5th Cir. 1979), cert. denied, 448 U.S. 906 (1980).

At the same time, Customs boardings for document inspections intrude only minimally into the privacy of those on board vessels in United States waters, and not at all into any legitimate, socially recognized expectation of privacy. Boardings are usually confined to the public or semi-public areas of a vessel, such as the weather decks (which are visible to all observers not aboard the vessel), navigation spaces such as the bridge (where vessel documents are usually found), and the hold (where the vessel's main beam identification number is located). Moreover, as previously noted, and in marked contrast to the situation regarding land-based vehicles, governmental regulation of foreign and domestic vessels on the nation's waters has changed little since 1789. Because of the "heavy overlay of maritime law and the long practice of regulatory stops, inspections and searches by [Customs] officers" (*United States* v. *Whitmire*, *supra*, 595 F.2d at 1313), those on board vessels on inland waterways have no reasonable expectation of complete freedom from government intrusion.[11]

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[11] Thus, the radical transformation of the nature of land transportation between 1789 and the present has significantly altered the reasonableness of regulatory practices in that context. This fact justifies decisions imposing restrictions under the Fourth Amendment on stops and searches of vehicles although the practices in question would not have been thought constitutionally unreasonable at the time of adoption of the Bill of Rights. Similar revolutionary changes have not occurred in navigation, and early concepts of reasonable regulation remain apt in the modern environment.

In addition, as the court observed in *United States* v. *Freeman*, *supra*, 579 F.2d at 946:

> [T]here is a substantial distinction between a landlocked vehicle and a nautical vessel for Fourth Amendment purposes. First, the national frontiers of the oceans are much more difficult to police than the territorial boundaries of the land. The exact lines are difficult to discern and there is no limit to the numbers of fixed points of entry. It's simply not practical to stop and inspect every vessel at the actual border, an imaginary line on the seas.

Nor, unlike in *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663, is it practical to set up roadblock-type stops on the nation's waterways. See *United States* v. *Whitmire*, *supra*, 595 F.2d at 1315. Furthermore, it is not feasible for Customs authorities to limit their inspections to vessels that have arrived at designated ports of entry, because Customs would then be powerless to prevent vessels such as the *Henry Morgan II* from smuggling dutiable goods or contraband into this country and unloading such items at a location other than a designated port of entry.[12]

Finally, close range observation or communication with nautical vessels is often difficult or dangerous in the absence of a boarding. We note that the Court in *Prouse* found it significant that, because automobiles must carry current license plates, a police officer could ascertain whether a car was currently registered without stopping it. 440 U.S. at 660. The same

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[12] Many of this country's major ports of entry for vessels are located on rivers or bays many miles from the coast or border: *e.g.*, Philadelphia, Baltimore, Seattle, New Orleans, Tampa. Because of the numerous entrances to the harbors and ports, it would be virtually impossible for Customs to carry out its enforcement responsibilities unless Customs officers are permitted to conduct routine boardings of vessels after their arrival in a river or bay leading to a port.

is not true of boats documented by the federal government. There is no nautical analogue to dated license plates or registration stickers for such vessels and thus no way to determine, simply from external observation, whether a vessel's registration is current or its documentation adequate.[13]

2. We are informed that, following issuance of the court of appeals' mandate, the district court dismissed the indictment against respondents. The Bureau of Prisons thereafter released respondents to the custody of the Immigration and Naturalization Service, and respondents have been deported. The actions taken by the district court in compliance with the mandate of the court of appeals do not defeat the jurisdiction of this Court over this case. See, *e.g.*, *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931). The fact that respondents have been deported, however, raises a question whether the instant case is moot. In *United States* v. *Sarmiento-Rozo*, 592 F.2d 1318 (5th Cir. 1979), the court of appeals held that the deportation of the defendants during the pendency of the government's appeal of a pretrial order dismissing the indictment rendered the case moot. This case,

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[13] Even if the Court were to conclude, as a general matter, that the Fourth Amendment does not permit Customs to board *all* vessels subject to Customs regulation on *all* inland waters in the absence of reasonable suspicion of some violation of law, we submit that, at the very least, Customs officers should be permitted to conduct suspicionless boardings of all vessels on those inland waterways that lead from the coast to ports of entry. Moreover, Customs officers should be permitted to board any vessel which they have reason to suspect is of foreign registry (regardless of whether they have sufficient information to warrant a border search). Under either of these alternatives, the boarding of respondents' vessel was proper.

of course, is in a materially different posture from *Sarmiento-Rozo*, since respondents were not deported until after entry of judgments of conviction. We submit that the possibility of their subsequent apprehension within the United States or of other collateral consequences that may ensue from their convictions are sufficient to prevent the case from being moot. Nevertheless, if the Court believes that the question of mootness is substantial, it may request the parties to address that question on plenary review. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for consideration of mootness. See *EPA* v. *Brown*, 431 U.S. 99 (1977).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to vacate the judgment of the court of appeals and remand the case to that court for consideration of mootness.

Respectfully submitted.

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JANUARY 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 80-3633

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ AND
ROBERT SORTGESE HAMPARIAN,
DEFENDANTS-APPELLANTS

Aug. 3, 1981

Appeal from the United States District Court
for the Western District of Louisiana

Before SKELTON*, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

SKELTON, Senior Judge.

On March 12, 1980, the defendants, Jose Renaldo Villamonte-Marquez and Robert Sortgese Hamparian, were indicted on four counts involving approximately 5800 pounds of marijuana, a Schedule I Controlled Substance. They were charged in Count 1 with conspiracy to import marijuana in violation of 21 U.S.C. § 963, in Count II with unlawfully importing marijuana in violation of 21 U.S.C. § 952(a), in Count III with conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846, and in

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* Senior Judge of the United States Court of Claims, sitting by designation.

Count IV with unlawful possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The indictment to which both defendants pleaded not guilty, resulted from the search and seizure of the sailboat Henry Morgan II where the marijuana was found. Following a hearing, defendants' motion to suppress the marijuana was denied by the district court. The case went to trial and a jury convicted the defendants on all four counts of the indictment. Each defendant perfected an appeal to this court, the primary thrust of which is directed to the district court's denial of the suppression motion. For the reasons set out below, we reverse.

The facts are as follows. On the evening of March 5, 1980, Customs Patrol Officer Buddy Jack Harrison, stationed in Morgan City, Louisiana, received information from a reliable informant that there were two loads of marijuana on two separate vessels in the Hackberry-Cameron, Louisiana, area waiting for persons to offload the cargo, and that the operators of those vessels spoke a foreign language. The informant could neither describe the vessels nor give their exact locations. This information was given to Senior Customs Patrol Officer Loren Wilkins who, with Customs Patrol Officer Robert Thompson, began a road check of docks and marinas for boats that would not ordinarily be in the area. A water search was also conducted by officers of the Louisiana Department of Wildlife and Fisheries and by customs agents.

About midnight on March 5, or in the early hours of March 6, while on the intracoastal waterway, the officers conducting the water search observed a small aluminum boat, approximately eighteen feet in length, in the water, with no running lights showing,

in violation of navigation laws. They noticed three five-gallon fuel cans in the rear of the boat, two of which contained diesel fuel, some new tarpaulins and a walkie-talkie radio. No fishing gear was observed aboard the boat, although the operator, whose driver's license identified him as John Lewis Dexter, stated that he was going to meet some friends below Hackberry to do some fishing. Later the officers observed Dexter travelling back and forth several times over the Ellender Bridge in a vehicle pulling an empty trailer. Dexter then proceeded under the bridge to load the boat, which he had left with the wildlife and customs officers while he went to get his vehicle and trailer. Prior to Dexter's arriving at the boat ramp to pick up his boat, the agent had checked his address as given to the wildlife agents and determined that no one with his name lived at the address given on his driver's license and that none of the cars present in the driveway at that address were registered to him.

Wilkins and other officers resumed their surveillance in a state police water patrol boat in the Calcasieu River Ship Channel,[1] when at approximately 11:00 or 11:35 A.M. on March 6, 1980, they first observed the sailboat Henry Morgan II anchored facing east on the west side of the ship channel. At the time of initial observance the sailboat was approximately 18 miles inland from the coast. As they approached the anchored sailboat, they observed a large freighter vessel moving north in the ship channel toward the Port of Lake Charles, creating a huge wake that caused the sailboat to rock violently from side to side. The patrol boat approached the sailboat from the port side and passed behind its stern, where

[1] Also referred to as the Lake Charles Ship Channel.

the words HENRY MORGAN II and a home port designated as Basilea were observed. At that point, Wilkins did not recognize Basilea as being a home port in the United States. As the officers were passing behind the stern of the sailboat, a man stood up on deck where the officers were able to see him. Agent Wilkins asked in a loud voice if he was all right. The man, later identified as defendant Robert Sortgese Hamparian, merely shrugged his shoulders and lifted his hands. Wilkins then repeated the question louder and got no response. There was a discussion by Wilkins with the officers on the boat, as he felt that the vessel was foreign since the man appeared not to understand English, and the home port was believed to be foreign.

Another individual, later identified as defendant Jose Renaldo Villamonte-Marquez, was seen looking out from the mid-cabin of the boat. Wilkins and Officer Danny Dougherty, a narcotics investigator for the Louisiana State Police, boarded the vessel to check documentation. Defendant Hamparian met the boarding officers and upon Wilkins' request to see the vessel's documentation, handed him a document, which appeared to be a request to change the registration of a ship from Swiss registry to French registry, written in French and dated February 6, 1980.

While talking to defendant Hamparian, Wilkins smelled the odor of burning marijuana and asked Officer Dougherty if he smelled it, too. After receiving Dougherty's affirmative response, Wilkins looked through an open door hatch and observed burlap-wrapped bales in plain view. Officer Wilkins entered the cabin and opened one of the bales, and, based on his prior experience as a customs officer and in law enforcement, he knew the bale contained marijuana. Defendant Villamonte-Marquez was at that time on

a sleeping bag on top of the bales. Wilkins then arrested both defendants and gave them the *Miranda* warning in both English and Spanish, and they acknowledged that they understood. A total of approximately 5,800 pounds of marijuana was found in the forward, mid and aft cabins, and under seats in the open part of the vessel.

After the search and the arrests were made, it was discovered that the vessel was almost out of diesel fuel. More fuel had to be obtained prior to moving the sailboat to the dock. In addition, neither of the foreign passports presented to Wilkins by the defendants indicated that they had been admitted to the United States. The marijuana and documents taken from the vessel were placed in the custody of special agent Dick Gustafson of the United States Drug Enforcement Administration.

At the trial, the defendants moved to suppress the marijuana, alleging an unlawful search and seizure of the sailboat and of the marijuana. The motion was denied and the case was tried to a jury. Both defendant Hamparian and defendant Villamonte-Marquez were convicted on all counts and each properly perfected his appeal to this court.

On Appeal, the defendants argue four main points of error which they contend require the reversal of their convictions. First, the district court erred in denying defendants' motion to suppress the marijuana. Second, the district court erred in allowing the nautical map of the Gulf of Mexico into evidence over defendants' objections that no foundation had been laid to establish the map's accuracy and the government had failed to comply with the defense's motion for discovery in relation to the map. Third, the district court abused its discretion in permitting the introduction of a log and an act of sale taken

from the Henry Morgan II without requiring the government to lay a proper foundation for authentication of the documents. Lastly, the district court abused its discretion in refusing to permit defendants' expert botanist to impeach the government's expert witness by testifying that there are three species of marijuana.

The primary issue is the constitutionality of the search and seizure of the Henry Morgan II and its cargo. By statute, customs officers have the authority to:

> * * * go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance. 19 U.S.C. § 1581(a).

The broad language of the statute, however, is circumscribed by the reasonableness requirement of the Fourth Amendment.[2] *United States* v. *D'Antignac*,

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[2] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

628 F.2d 428, 432 (5 Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981); *United States* v. *Serrano*, 607 F.2d 1145, 1147 (5 Cir. 1979), *cert denied*, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *United States* v. *Freeman*, 579 F.2d 942, 945 (5 Cir. 1978).

The constitutionality of the boarding of a vessel in inland waters by customs officers pursuant to 19 U.S.C. § 1581(a) has been the subject of numerous cases in this circuit, e.g., *United States* v. *Guillen-Linares*, 643 F.2d 1054 (5 Cir. 1981); *United States* v. *D'Antignac*, *supra*; *United States* v. *Serrano*, *supra*; *United States* v. *Castro*, 596 F.2d 674 (5 Cir. 1979), *cert. denied*, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1980).

The Supreme Court addressed the question of the constitutionality of investigatory stops of vehicles, not near the border by roving patrols of the United States Border Patrol in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The court concluded that:

> [e]xcept at the border and its functional equivalents officers on roving patrol may stop vehicles only if they are aware of specific articulable facts together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain illegal aliens or contraband. 422 U.S. at 884, 95 S.Ct. at 2581-82, 45 L.Ed.2d at 618.

Applying the "reasonable suspicion" standard, the court held in that case that the single factor relied on by the officers to justify the stop, namely, the apparent Mexican ancestry of the vehicle's occupants, was not sufficient.

This court has approved boardings of vessels in inland waters by customs officials where the officers had reasonable suspicion of a customs violation. In *United States* v. *Whitmire*, 595 F.2d 1303 (5 Cir. 1979), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980), we upheld the boarding of a docked boat that had been initially sighted travelling in the intracoastal waterway. After first determining that the border search analysis was inapplicable on the facts but that a recent nexus to the border is not a prerequisite for an investigatory stop based on reasonable suspicion, we held that the officers did have a reasonable suspicion of a customs violation after observing that the boat had been riding heavy in the bow and had sped through a "no wake" area in violation of navigation laws, and after an unsatisfactory document check ashore. *Id.*

In *United States* v. *Castro*, *supra*, this Court was, for the first time, called upon to address the constitutionality of the search of a vessel which had been initially sighted in inland waters and subsequently searched while still in those waters. In that case, after observing the shrimping vessel Tanila on the intracoastal waterway, and prior to boarding it, the customs agents ran a document check and were informed by the Coast Guard documentation officer that no vessel named Tanila was documented. Thereupon, the officers boarded and searched the vessel. Upholding the legality of the boarding and the search, we held that:

> [a]t the time of the boarding, the customs agents possessed sufficient articulable facts to support an inference that the TANILA was involved in smuggling contraband. Boarding to determine the vessel's identity and documentation was a

reasonable response to that suspicion. 596 F.2d at 676.

The boarding and search of the shrimping vessel, the Bonnie Lass, was held to be valid in *United States* v. *Serrano*, *supra*, where the vessel had been seen travelling in Tampa Bay at night without the required navigation lights. The court concluded in that case that the applicable standard was that:

> Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581 (a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband. See *United States* v. *Rivera*, 595 F.2d 1095, 1098 n.4 (5th Cir. 1979) 607 F.2d at 1148.

In *United States* v. *D'Antignac*, *supra*, we formulated the *Serrano* rule into a test, holding that:

> the constitutionality of the boarding [of a vessel in inland waters under § 1581(a)] turns * * * on one of the following two principles: 1) a border search; or 2) a limited investigatory stop based upon a reasonable suspicion of law violation. 628 F.2d at 433.

See, United States v. *Guillen-Linares*, 643 F.2d at 1056, and *United States* v. *Serrano*, *supra*. In the *D'Antignac* case, we upheld the boarding and search of the M/V Little Hornet, a shrimping vessel, on the basis of the second principle after rejecting the border search concept. The erratic movements of the Little Hornet late at night in the intracoastal waterway, the fact that the coastal waters were closed to

shrimping, and the prior information that the Little Hornet was suspected of being involved in smuggling contraband raised a reasonable suspicion of a law violation.

In the recent case of *United States* v. *Guillen-Linares, supra,* which involved the boarding and search of the Miss Port Canaveral, we addressed the issue of whether, absent any articulated facts or circumstances which might have aroused in the customs officers a reasonable suspicion of illicit activity, the seizure of the Miss Port Canaveral was reasonable under the fourth amendment. In reversing the district court's denial of the defendants' motion to suppress, we held that the boarding violated the reasonableness requirement of the fourth amendment. *Id.* at 1057.

In the instant case we are only concerned with the constitutionality of the officers' initial boarding of the vessel. The defendants do not contest the existence of probable cause and exigent circumstances to justify a warrantless search of the vessel once the officers had boarded it and smelled marijuana. *See, e.g., United States* v. *Serrano,* 607 F.2d at 1148; *United States* v. *Kleinschmidt,* 596 F.2d 133, 136 (5 Cir. 1979), *cert. denied,* 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 184(1979); *United States* v. *Freeman,* 579 F.2d at 948.

The government contends that the facts support the boarding of the Henry Morgan II as a valid border search, however in its denial of the motion to suppress, the district court upheld the boarding solely on the basis of a reasonable suspicion of a customs violation. For a boarding of a vessel in inland waters to be justified on the basis of a border search, there must be some nexus to the border, some degree of

probability that the vessel has crossed the border. *See United States* v. *Whitmire, supra,* where we held:

> In water cases, the true border is an imaginary line three miles offshore. Though we have not required the coast guard or customs officers to observe the vessel as it crosses this imaginary line, our precedent generally has required that the officials have articulable facts from which they may reasonably infer that the boat has come from international waters. 595 F.2d at 1307.

This court has rejected the border search analysis in cases where the facts indicating the probability of a border crossing were much stronger than those in the instant case. In *United States* v. *Whitmire, supra,* we found the border search analysis inapplicable, although the boat was initially sighted within the shoreline in an inlet between the ocean and the intracoastal waterway, the boat was encrusted with salt crystals, and the boat's occupants were wearing brand-new sweatshirts with the word "Bimini" printed across the chest. We again refused to uphold the boarding of a vessel as a valid border search in *United States* v. *Castro, supra,* where the Tanila was first sighted offshore and later seen by officers on the intracoastal waterway approximately 20 miles from open waters. In upholding the boarding of the vessel Business Stinks on the basis of reasonable suspicion of wrongdoing in *United States* v. *Kleinschmidt, supra,* the court did not decide whether the vessel, which was sighted approximately one mile offshore, had a sufficient nexus to justify the boarding as a border search.

In the instant case, the Henry Morgan II was first sighted approximately 18 miles inland from the coast-

line, 21 miles from the border. When sighted and boarded the vessel was at anchor with no indication that it had just come from the high seas as was the case in *Whitmire* where the hull of the boat was encrusted with salt crystals. Although the vessel had just entered the United States as evidenced by its log books examined after the boarding, the officers had no reason to believe prior to boarding that this was the case. It is clear on the record before us that at the time of the boarding of the vessel, there was no nexus with the border and, therefore, we conclude that the boarding of the defendants' vessel under § 1581(a) cannot be justified on the basis of a border search.

We now turn to the second basis for the boarding of the vessel in inland waters under § 1581(a), which requires the officers to have a "reasonable suspicion of a law violation." In denying the defendants' motion to suppress, the district court listed five articulable facts which he found gave the officers a reasonable suspicion of a customs violation. One, the information given to officer Harrison by a confidential informant that two boats with foreigners would be in the Hackberry-Cameron, Louisiana, area with marijuana on board waiting to be offloaded. Two, the finding of the aluminum boat in the water at midnight without running lights and with gasoline cans containing diesel fuel. Three, the sighting of the Henry Morgan II in the ship channel where the officers had never before seen a sailing vessel anchored. Four, the name of the home port painted on the stern of the vessel appeared to be a foreign port. Five, the actions of defendant Hamparian in shrugging his shoulders and failing to speak in response to officer Wilkins' questions about possible

injuries aboard, which gave the officer reasonable suspicion to believe he was a foreigner.

None of the "articulable facts" cited by the district court even arguably support the required reasonable suspicion of law violation. The government placed great emphasis on the aluminum boat found operating at night without running lights and the activities of the boat's occupant. The only possible nexus between the aluminum boat and the sailboat was the discovery of the cans of diesel fuel on the aluminum boat and the fact that the Henry Morgan II was out of diesel fuel. However, this tenuous nexus is not valid in light of the fact that the officers did not discover that the Henry Morgan II was out of fuel until after the boarding and search had been completed and the defendants had been placed under arrest without first establishing a connection between the two vessels. The activities of the aluminum boat and its occupant do not create any suspicion about the sailboat. Therefore, the suspicious activities of the occupant of the aluminum boat cannot be considered as a factor to justify the boarding when no possible connection was made with the sailboat prior to the boarding.

Another fact relied on by the district court was the confidential tip given by an informant to officer Harrison that there were two boats with foreigners and loaded with marijuana in the Hackberry, Louisiana, area. The tip, apparently based on hearsay, contained no specific information on the type of vessel or the nationality of the alleged smugglers. The officers testified that it was their intent to make a general search of the Hackberry area for any vessels they did not believe normally belonged there. General information of the type supplied by the informant

did not give the government agents a roving commission to stop and question the occupants of all boats not recognized as ordinarily present in the area.

The officers also testified that the Henry Morgan II's position, anchored in the ship channel, was an unusual place for a sailboat. At the time it was sighted, the vessel's sails were down and it was facing in a south or southeasterly direction. Officer Wilkins testified that he had seen shrimper-type vessels anchored in the channel before, and that there were sailboats on nearby Calcasieu Lake. Generally, for an unusual location to be "suspicious" requires the presence of other factors that are suspicious in and of themselves, as in *United States* v. *D'Antignac, supra*, where the fact that shrimping vessels were not normally found in a particular area was accompanied by erratic movements of the vessel, and the fact that the vessel was on the list of suspected smuggling vessels.

The district court also found that the officers' belief that the sailboat's home port "Basilea" painted on the stern was foreign and that defendant Hamparian was of foreign origin due to his method of replying to officer Wilkins by shrugging his shoulders, supported a "reasonable suspicion" on the part of the officers. In *United States* v. *Castro, supra*, one important factor giving rise to a reasonable suspicion to justify the boarding was the check with the Coast Guard documentation officer in Washington, D.C. about the vessel which revealed that no vessel named Tanila was documented. In the instant case, however, the officers did nothing prior to the boarding to substantiate their belief that the Henry Morgan II was a foreign vessel or that Basilea was a foreign port. They merely assumed that the ship and port

were foreign. Such an assumption on the part of the officers, without some effort by them to determine if it was correct, was not sufficient to support a "reasonable suspicion" that justified the boarding of the vessel. Likewise, defendant Hamparian's shrugging of his shoulders rather than answering the officer orally did not necessarily indicate that he was of foreign origin. The officers merely assumed that he was a foreigner.

Whether reasonable suspicion exists in a particular case depends on the totality of the circumstances. *See United States* v. *Brignoni-Ponce*, 422 U.S. at 885, n.10, 95 S.Ct. at 2582, n.10, 45 L.Ed.2d at 618 (1975); *United States* v. *Escamilla*, 560 F.2d 1229, 1231 (5 Cir. 1977). However, an officer's hunch or generalized suspicion of criminal activity is not sufficient. *See, Terry* v. *Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906 (1968); *United States* v. *Himmelwright*, 551 F.2d 991 (5 Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). As Mr. Justice Harlan stated in his concurring opinion in *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968):

> There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests * * * criminal activity * * * 392 U.S. at 73, 88 S.Ct. at 1907, 20 L.Ed.2d at 941.

See, *United States* v. *D'Antignac*, 628 F.2d at 434 (erratic movements of vessel, coastal shrimping out of season, boat on list of suspected smuggling vessels); *United States* v. *Serrano*, 607 F.2d at 1149 (traveling at night without navigation lights, exchange of lights with another darkened vessel,

shrimper vessel stopped in shallow area near residential area); *United States* v. *Castro*, 596 F.2d at 676 (document check determined that no vessel named Tanila was documented); and *United States* v. *Whitmire*, 595 F.2d at 1316 (violation of navigation laws, vessel riding heavy in the bow, unsatisfactory document check ashore).

In the case before us, the government can point to nothing which could have affirmatively suggested a possible law violation to the officers. From the "articulable facts" known to the officers at the time of the boarding, a reasonable suspicion of a law violation could not rationally be inferred. The facts could support nothing more than a generalized suspicion and speculation in the minds of the officers. Therefore, the search and seizure of the vessel and its cargo was not reasonable under the fourth amendment. We hold that the court erred in denying defendants' motion to suppress.[3]

The decision of the district court is reversed.

REVERSED.

---

[3] Because of our disposition of the fourth amendment issue, we do not reach the other points of error raised by the defendants.

APPENDIX B

[Oral Opinion of the United States District Court for the Western District of Louisiana, Dated May 8, 1980]

* * * * *

[130] THE COURT: The matter before the Court is a motion to suppress the evidence seized in this matter. The testimony establishes the following; that on March 5, 1980, around 8:00 o'clock P.M., customs officer Buddy Jack Harrison received information from a reliable informant that there would be two ships, two separate boats with contraband in the Hackberry-Cameron area, and that the people who would be aboard these boats spoke foreign languages. He subsequently contacted his son who is also a customs officer. And that matter was relayed to his supervisor, Mr. Wilkins.

As a result of this information the customs officials began a search in the vicinity of the Hackberry-Cameron area. About midnight, March 5, 1980, or in the early hours of March 6, 1980, they came across a small aluminum boat approximately eighteen feet in length, with no lights, no running lights. This was done as the gentlemen were looking for the alleged two vessels. Their observation of this vessel was that they noted the usual fuel cans for the vessel but they also noticed three regular five gallon cans [131] in the area of the rear of the boat, along with the two fuel tanks. They stopped and gave this person a citation for the no lights, and in their discussions with this individual, he stated he was going fishing but the gentlemen noted that there was no fishing gear aboard the boat. They also noted aboard, in plain view, two new tarpaulins. Subsequently, it went on that he was taken to the

landing and he was going to go back and get his wife to come get the boat. Sometimes later on he was observed crossing Ellender Bridge three or four times.

This raised a suspicion in the officer's mind since it certainly was not essential that he cross the Ellender Bridge three or four times since he was aware of where his boat was, in order to pick it up.

Then along about 11:30 A.M., after getting together with the State Police and other people, Danny Dougherty, a Louisiana State Policeman, along with Mr. Wilkins, the supervisor for the customs officers, were traveling in the Hackberry area in the Intracoastal Canal. And at some period in time, between the community of Hackberry and two or two and a half miles south of it they spotted the subject sailboat.

Prior to arriving at the sailboat, a large ship coming up the channel, heading north, caused some waves and wakes, and they noticed the sailing vessel with the [132] draw of the water to hit the bottom and rock drastically back and forth, to the point where they thought the vessel would capsize.

After the ship passed, they proceeded on further and observed the name of the sailboat. I might add that the sailboat was headed in a southeasterly direction and they were heading south.

So they noted from the stern the name of the vessel to be Henry Morgan, II. As they got closer to it, they noticed the name Basilea, if I am pronouncing it correctly, which the customs agent testified to would appear to him to be a vessel from a foreign port.

In the meantime, as they got closer to the vessel, one of the defendants appeared upon the deck. And

they got close to it and inquired of this individual to the effect are you hurt. This individual shrugged his shoulders and raised open hands. This was repeated with the same response. So then the agents decided to board the vessel because of all of the circumstances which included the information previously given about two boats with marijuana in the Cameron-Hackberry area, the information he had secured about the eighteen foot aluminum craft that had the extra gas tanks and new tarpaulins with no fishing gear for a man going fishing, and to inquire of the papers. He certainly had a suspicion with all that information, plus [133] the name of the alleged home port for the vessel. He boarded the vessel along with a companion for security purposes and within seconds to a couple of minutes, had ascertained and noted a smell of burning marijuana. They then observed through the open door bales of what this customs agent testified to being what he customarily saw in seizing contraband.

From that point then, of course, he placed the defendants under arrest and then seized the vessel. The law, as stated by the Fifth Circuit Court of Appeals for the United States provides that in inland waters that a boarding is not allowed unless the officers have a reasonable suspicion of a customs violation, citing United States versus Whitmore, 595 F.2d 1303.

So in order for Agent Wilkins or Officer Wilkins and Dougherty to have boarded the vessel, they must have reasonable suspicions of a customs violation. What are the articulable facts to support a reasonable suspicion? One, information given to customs officer Harrison from a reliable informant that two boats with foreigners would be in the Hackberry-Cameron area with marijuana.

Two, the finding of the aluminum boat at midnight with no running lights, with three five gallon gas cans, which turned out that two of them held diesel fuel, for a boat [134] that burns gasoline, and with two tarpaulins.

Three, the sighting of this sailboat in the channel which the agents, to the best of their recollection, had never found a sailing vessel to be anchored in the ship channel. Four, indication that the home port of this vessel appeared to be a foreign port. Five, when the agents inquired of the individual aboard the vessel as to are you hurt, in response to the drastic rocking of the sailboat after the large ship had passed, the individual shrugged his shoulders and raised open hands. This occurred on two occasions, again indicating that the individual did not understand, thereby, giving reasonable suspicion to the officer that they would be people of foreign origin.

Therefore, these are the articulable facts which the Court finds served as a basis for boarding the vessel to document its papers.

Once aboard the vessel within, as Officer Dougherty said, within thirty seconds they smelled marijuana. Agent Wilkins said within seconds, up to a couple of minutes, they smelled marijuana burning and observed in plain view bales which appeared to Officer Wilkins as marijuana.

This certainly served as probable cause to search the vessel once they had been aboard the vessel. So for these reasons the Court finds that there was reasonable suspicions [135] of a customs violation in order to board the vessel. And there was probable cause for the search once aboard the vessel.

The motion to suppress the evidence in this case is denied.

* * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-3633

D.C. Docket No. CR-80-20012-01-02

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSE RENALDO VILLAMONTE-MARQUEZ and ROBERT SORTGESE HAMPARIAN, DEFENDANTS-APPELLANTS

[Filed Nov. 3, 1981]

Appeal from the United States District Court for the Western District of Louisiana

Before SKELTON*, Senior Judge, and RUBIN, and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

---

* Senior Judge of the United States Court of Claims, sitting by designation.

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

A true copy
Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Andrew S. Rodino
ANDREW S. RODINO

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3633

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JOSE RENALDO VILLAMONTE-MARQUEZ and
ROBERT SORTGESE HAMPARIAN,
DEFENDANTS-APPELLANTS

Filed Oct. 19, 1981

Appeal from the United States District Court for the Western District of Louisiana

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 08/03/81, 5 Cir., 1981, —— F.2d ——).
(————————)

ORDER:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED.

No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

(——) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 384717 783

Joint Appendix

Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1350

In The Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD P. IEYOUB
512 Pujo Street
Lake Charles, Louisiana 70601
(318) 439-9770

PETITION FOR CERTIORARI FILED JANUARY 18, 1982
CERTIORARI GRANTED JUNE 7, 1982

In The Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1350

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CRIMINAL DOCKET—U.S. DISTRICT COURT

CR 80—20012-01
CR 80—20012-02

VILLAMONTE-MARQUEZ, JOSE REYNALDO
HAMPARIAN, ROBERT SORTGESE

3-12-80	1	BOTH DEFTS.	INDICTMENT; open
3-31-80	24	BOTH DEFTS.	MOTION (defts.) to suppress evidence
4-16-80	30	BOTH DEFTS.	REPLY (govt.) in opposition of motion to suppress
4-22-80	31	BOTH DEFTS.	AMENDED INDICTMENT, open.
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5-8-80*	42	BOTH DEFTS.	HEARING-MINUTES, denied motion to suppress
6-2-80	40-A	BOTH DEFTS.	TRIAL-MINUTES; 1st day Deft. Motion to Suppress Statement; GRANTED.
6-3-80	41-A	BOTH DEFTS.	TRIAL-MINUTES; 2nd day.
6-4-80	42-A	BOTH DEFTS.	TRIAL-MINUTES; 3rd day.
6-4-80	48-A	VILLAMONTE	VERDICT, G all counts;
6-4-80	49-A	HAMPARIAN	VERDICT, G all counts.
7-29-80	54	BOTH DEFTS.	SENTENCING-MINUTES, Ct. 1, 5 yrs. custody; Ct. 2, 5 yrs. custody, consecutive to sentence on Ct. 1; Ct. 3 & Ct. 4, 5 yrs. custody each, concurrent with sentences on Ct. 1 & Ct. 2. Deft. advised of right to appeal.
7-30-80	57	BOTH DEFTS.	APPEAL from jury verdict, no filing fee
8-7-80	58	BOTH DEFTS.	APPEAL from jury verdict & sentence, no filing fee
11-2-81	76	01,02	MANDATE, reversed district court.

11–23–81	82	01,02	ORDER, C/A, mandate recalled and stayed to and including December 7, 1981.
12–14–81	85	01,02	MANDATE of 10–29–81 reissued 12–8–81, reversing District Court.
12–21–81	86	01,02	MOTION (govt) & ORDER, indictment dismissed, defts. remanded to custody of Immigration & Naturalization Service for deportation.

U.S. COURT OF APPEALS
FIFTH CIRCUIT—DOCKET

No. 80–3633

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOSE RENALDO (SIC) VILLAMONTE-MARQUEZ
AND ROBERT SORTGESE HAMPARIAN,
DEFENDANTS-APPELLANTS

7–30–80	Notice of Appeal filed
4–7–81	Case argued
8–3–81	Opinion rendered
8–28–81	[Government's] petition for rehearing with suggestion for rehearing en banc, filed
10–19–81	Order denying petition for rehearing filed
10–29–81	Mandate issued
11–16–81	Mandate recalled and stayed
12–8–81	Mandate reissued

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CRIMINAL NO.
80-20012-01
80-20012-02

FILED: APR. 22, 1980

21 U.S.C. 963; 21 U.S.C. 952 (a);
21 U.S.C. 846 and 21 U.S.C. 841(a)(1)

UNITED STATES OF AMERICA

V.

JOSE RENALDO (SIC) VILLAMONTE-MARQUEZ AND ROBERT SORTGESE HAMPARIAN

AMENDED INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

Commencing on February 1, 1980, the exact date being unknown to this Grand Jury and continuing until on or about March 6, 1980, in the Western District of Louisiana and elsewhere, JOSE RENALDO (sic) VILLAMONTE-MARQUEZ and ROBERT SORTGESE HAMPARIAN, being named herein as coconspirators and defendants, and various other persons unknown to this Grand Jury, did wilfully and knowingly combine, conspire, confederate and agree with each other to commit the following offense against the United States of America, to wit:

To knowingly, intentionally and unlawfully import into the United States of America from a place outside thereof, marijuana, a Schedule I non-narcotic drug controlled substance, in violation of Title 21, United States Code, Section 952 (a), all in violation of Title 21, United States Code, Section 963.

COUNT II

On or about March 6, 1980, in the Western District of Louisiana, JOSE RENALDO (sic) VILLAMONTE-MARQUEZ and ROBERT SORTGESE HAMPARIAN, and other coconspirators unkown to this Grand Jury, did unlawfully, knowingly and intentionally import into the United States of America from a place outside thereof, marijuana, a Schedule I non-narcotic drug controlled substance, all in violation of Title 21, United States Code, Section 952 (a).

COUNT III

Commencing on February 1, 1980, the exact date being unknown to this Grand Jury and continuing until on or about March 6, 1980, in the Western District of Louisiana and elsewhere, JOSE RENALDO (sic) VILLAMONTE-MARQUEZ and ROBERT SORTGESE HAMPARIAN, being named herein as coconspirators and defendants, and various other persons unknown to this Grand Jury, did wilfully and knowingly combine, conspire, confederate and agree with each other to commit the following offense against the United States of America, to wit:

To unlawfully, knowingly and intentionally possess with intent to distribute, marijuana, a Schedule I non-narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 846.

COUNT IV

On or about March 6, 1980, in the Western District of Louisiana, JOSE RENALDO (sic) VILLAMONTE-MARQUEZ and ROBERT SORTGESE HAMPARIAN, and other coconspirators unknown to this Grand Jury, did unlawfully, knowingly and intentionally possess with intent to distribute, marijuana, a Schedule I non-narcotic drug controlled substance, all in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:
SISTER REGINA NUNEZ
Foreperson, Federal Grand Jury

J. RANSDELL KEENE
United States Attorney

A. M. STROUD, III
Assistant United States Attorney

WILLIAM L. GOODE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA

v.

ROBERT SORTGESE HAMPARIAN;
JOSE RENALDO VILLIMONTE-MARQUEZ (SIC)

Criminal Nos. 80–20012–02
80–20012–01

MOTION TO SUPPRESS THE EVIDENCE

NOW INTO COURT, through undersigned counsel, comes ROBERT SORTGESE HAMPARIAN and JOSE RENALDO VILLIMONTE-MARQUEZ (sic), made defendants herein, and protest that they have had their Constitutional rights violated as are guaranteed by the Constitution of the United States, in that the evidence seized from a vessel occupied by them, particularly a certain number of bales of marijuana, to be used against them, has been unlawfully and illegally obtained, and the defendants move that this evidence be suppressed in any criminal proceedings against them for the following reasons, to-wit:

1.

The boarding of the vessel, HENRY MORGAN, II, by customs agents was illegal and therefore any evidence seized subsequent to and as a result of said boarding is inadmissible.

2.

The search of the vessel, HENRY MORGAN, II, and the seizure of evidence therefrom was conducted without a warrant and at the time of the said search and seizure, there were no circumstances justifying or supporting the warrantless search.

3.

There was no probable cause to search the vessel HENRY MORGAN, II.

4.

Any consent to search was not freely and voluntarily given, for the following reasons:

a) The defendants were never adequately informed of their Fourth Amendment rights, more specifically, the right not to consent to a search of their vessel;

b) Any consent to search was obtained from the defendants by the use of coercion and intimidation, both actual and implied.

WHEREFORE, the defendants pray that this Motion to Suppress the Evidence, particularly a certain number of bales of marijuana taken from the vessel, HENRY MORGAN, II, be maintained, and the evidence sought to be used by the United States of America in this matter or any related proceedings be ordered suppressed in its entirety by this Honorable Court, and that the United States of America, through its authorized representative, be prohibited from introducing same during the trial of this matter, and also be prohibited from making reference thereto during the trial of this matter.

By: RICHARD P. IEYOUB
1130 Pithon Street
P.O. Box 1645
Lake Charles, LA 70602
Attorney for Defendants

CERTIFICATE

I hereby certify that a copy of the above and foregoing Motion to Suppress the Evidence has this day been served on the office of the United States Attorney, Western District of Louisiana, by depositing same in the United States mail, postage prepaid.

Lake Charles, Louisiana, this 30th day of March, 1980.

/s/_____

RICHARD P. IEYOUB

Supreme Court of the United States

No. 81-1350

UNITED STATES, PETITIONER,

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ, *et al.*

ORDER ALLOWING CERTIORARI. Filed June 7, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Opposition

Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS
CLERK

81-1350

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

UNITED STATES OF AMERICA,

Petitioner

versus

JOSE REYNALDO VILLAMONTE-MARQUEZ AND
ROBERT SORTGESE HAMPARIAN,

Respondents

*****

RESPONSE TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

*****

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Attorney For Respondents

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STATEMENT

Prior to trial, respondents moved to suppress approximately 5,800 pounds of marijuana seized by customs officers following a boarding of respondent's vessel. At the Motion To Suppress, a customs agent located in Morgan City, Louisiana, testified that on March 5, 1980, the day before the Henry Morgan, II was boarded, he received information form an individual who stated that there were two loads of marijuana in the Hackberry, Louisiana area. This marijuana was supposedly loaded on two separate boats, but the individual could not give any description of the boats. Although the agent testified that he felt the individual was a reliable informant, he stated that this individual received the information from "a conversation with some more people". The agent readily testified that on March 5, 1980, he did not even know that the Henry Morgan, II existed. (Record, Vol. 2, at 6, 7, 10.)[1]

The information received by the customs agent in Morgan City, Louisiana, was transmitted to customs officials in the Port Arthur, Texas area who then formed a patrol of law enforcement officials to conduct a search of the Calcasieu Ship Channel.

The Henry Morgan, II was initially sighted by customs officials and agents of the Louisiana State Police in inland waters at approximately 11:30 a.m. on March 6, 1980. (Record, Vol. 3 at 174). At the time of the sighting, the vessel was anchored in the Calcasieu Ship Channel some eighteen miles inland from the coast of Louisiana. (Record, Vol. 3 at 175, 176). No one was seen on the deck of the vessel, the sails were not up and then there was no movement of the vessel. (Record, Vol. 2 at 45; Record, Vol. 3 at 45, Record, Vol. 3 at 179, 256).

[1] "Record" refers to the record lodged in the Court of Appeal.

Testimony of the government witnesses clearly indicated that the vessel occupied by the government agents first approached the Henry Morgan, II because a large wake left by a freighter moving up the ship channel allegedly caused the Henry Morgan, II to tilt violently and the government agents were supposedly concerned for the safety of the individuals aboard the vessel and sought to inquire as to whether anyone was hurt. (Record, Vol. 2 at 48, 80, 100). As the boat containing the customs agents and officers of the State Police passed near the Henry Morgan, II, one of the officers noticed the name of the vessel and the word "Basilea" immediately underneath the name which appeared on the stern of the vessel. Officer Loren Wilkins of United States Customs testified that when he saw the word "Basilea", he had a "reasonable suspicion" that this was a foreign port. He was quick to add, however, that he did not know for a fact that this was a foreign port, admitting that he was not familiar with all of the ports in the United States. More significant is the fact that no computer check was made by the officers to determine whether or not Basilea was a foreign port and the Henry Morgan, II a foreign vessel. (Record, Vol. 2 at 100, 101; Record, Vol. 3 at 180, 181).

At the time the officers were passing around the Henry Morgan, II, respondent, Hamparian came out on the deck. Officer Wilkins testified that he inquired as to whether or not Hamparian was hurt and Hamparian responded by shrugging his shoulders and lifting his hands. It was then that officer Wilkins decided to board the vessel. (Record, Vol. 2 at 101, 102). Both Officer Wilkins and Officer Danny Dougherty of the Louisiana State Police testified that when they saw Mr. Hamparian on the deck of the vessel, he did not appear to be hurt in anyway. He was not limping and did not have any visual signs of being injured severely. (Record, Vol. 2 at 48, 49; Record, Vol. 3 at 181). As stated previously, the officers originally approached the vessel in order to determine whether or not anyone was injured as a result of the violent tilting of the

vessel. It did not appear to them that anyone was hurt, but despite this fact, they proceeded to board the Henry Morgan, II.

After Officer Wilkins boarded the Henry Morgan, II, he asked Mr. Hamparian for documentation and was presented a document. (Record, Vol. 2 at 104, 50). Officer Danny Dougherty of the Louisiana State Police also boarded the vessel shortly after Officer Wilkins stepped aboard. (Record, Vol. 2 at 57). After boarding the vessel, the officers supposedly smelled an odor of burning marijuana which caused them to look toward the hold of the boat. Officer Wilkins then testified that he saw some burlap sacks around bulky objects that looked like bells. A search of the vessel was then conducted and the respondents were placed under arrest. (Record, Vol. 2 at 58, 110, 111).

The true nature of the search conducted by the agents was clearly shown by their own testimony. That testimony graphically illustrated that the search was not based on sufficient articulable facts to support an inference that the Henry Morgan, II was smuggling contraband, but was rather a random and general search during which every vessel located in the Calcasieu Ship Channel was subject to being stopped and boarded.

Officer Danny Dougherty of the Louisiana State Police testified:

> "In lacking specific information, we were looking for anything we could consider to be out of the ordinary or uncommon to that area..." (Record, Vol. 2 at 24).
>
> "Q I think you stated on direct examination that there was specific information lacking concerning these alleged vessels, right?
>
> "A That's correct.
>
> "Q So you were not looking for a specific vessel or specific type of vessel, as you have stated on direct examination. You were just looking for anything that might be uncommon or as you thought might be out of the ordinary?
>
> "A That's true, sir...." (Record, Vol. 2 at 41).

Officer Loren Wilkins testified as follows:

"Q Mr. Wilkins, this information from Mr. Harrison that you received was general information, was that right?

"A That is correct, Yes, sir.

"Q No specific vessel was referred to, certainly not the Henry Morgan, II?

"A That is correct. No names, no types of vessels...." (Record, Vol. 2 at 94).

"Q And in fact, it was your intention after receiving this information to check all of the docking areas, all of the places that you might find vessels?

"A That is correct.

"Q At this time you had no information regarding the Henry Morgan, II?

"A That is correct...." (Record, Vol. 2 at 95).

"Q Now since you did not have an exact location as to where these alleged vessels might have been, it was your intention, I assume, to patrol the entire area around Cameron and Hackberry, is that correct?

"A Yes, sir, that was my intention.

"Q And, of course, it was your intention to patrol the entire Calcasieu Channel, if possible, is that right?

"A Yes, sir. In fact we started at Lake Charles that following morning.

"Q How many miles does that channel cover, do you know, how many statute miles?

"A No I do not know the exact. I can guess.

"Q Okay. If you could?

"A Approximately 25, 30, maybe 35 miles. This is just a real rough approximation...." (Record, Vol. 3 at 171, 172).

"Q Okay. And so your intention was, or you felt you had to patrol this entire area, is that correct?

"A Yes sir. We started at Hackberry where the information was, and then as we progressed we moved out a little further until we hopefully found something.

"Q Okay. Now you were checking every dock area, every marian and anything in the area that might contain boats, is that correct?

"A We did this too-we are fairly familiar with what boats are there normally. So by checking them, looking into them, we can find out if there is a boat that perhaps is not normally in the area...." (Record, Vol. 3 at 172).

Perhaps the most significant testimony given in this regard was given by Officer Jerome Segura of the Louisiana State Police. Officer Segura was not called to testify at the Motion To Suppress, however, he did testify at trial as follows:

"Q Was it your intention at that time, and the intention of those aboard your vessel, to approach it in order to determine whether or not someone was hurt on the vessel?

"A At that time our first intention was to see if anybody was hurt. We were going to board the vessel had not the ship done anything to it. We would have boarded the vessel anyway.

"Q Well, are you saying that a decision was made to board the vessel prior to the time you saw the ship almost capsize?

"A The decision was made when we left out of Lake Charles that we were going to board any vessel we found in the ship channel. That vessel was in the ship channel, so therefore, we were going to board it.

"Q Okay. So that decision was made prior to the time that you all got into the channel, that every vessel in the ship channel would be boarded?

"A Right...." (Record, Vol. 3 at 239, 240).

The Motion To Suppress filed by respondents, was denied by the District Court, and after a jury trial, respondents were each convicted on all counts of the indictments against them. An appeal was then taken to the United States Court of Appeal for the Fifth Circuit.

REASONS FOR DENYING PETITION

The government does not challenge the decision of the Court of Appeal which established:

(a) That there was no reasonable suspicion of a law violation which would have authorized the boarding of the vessel in question under 19 U.S.C. 1581.

(b) That there were insufficient facts to validate the search of the vessel under the border search exception espoused in United States v. Brignoni Ponce, 422 U.S. 873.

The government would have this Honorable Court interpret 19 U.S.C. 1581 in such a way as to grant customs officials the authority to stop and board any vessel, anywhere in the United States without any Fourth Amendment constraints.

The government attempts to argue that the governmental interests served by customs' boardings of vessels on inland waters to check documents, subject to federal regulation outweighs the minimal intrusion on privacy entailed by such boardings. The government further arques that the Fourth Amendment principles applied in the cases of United States v. Brignoni-Ponce, supra, and Delaware v. Prouse, 99 S.Ct. 1391 (1979) should not be applied in cases where customs officials stop and board a vessel in inland waters in order to check the vessel's documentation. This argument is based solely on the premise that automobile travel should be treated differently for Fourth Amendment purposes than travel in vessels. This erroneous argument will be addressed later. Initially, however it is important to note that the governmental interests present in Brignoni-Ponce and Delaware v. Prouse were no less important than those in the instant case. Furthermore, the statute with which the Court was concerned in Brignoni-Ponce, Section 287(a) (3) of the Immigration and Nationality Act, 8 U.S.C. Section 1357(a) (3), is very similar to 19 U.S.C. 1581, both in purpose and the broad grant of authority. This statute authorized agents, without a warrant,

> "within a reasonable distance from any external boundary of the United States, to board and search for aliens, any vessel within the territorial waters of the United States and any railway cars, aircraft, conveyance, or vehicle...." (Emphasis added)

Despite the language of the statute, this Honorable Court held:

> "But 'no act of Congress can authorize a violation of the Constitution,' Almeida-Sanchez, supra, 413 U.S. at 272, 93 S.Ct. at 2539, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas." United States v. Brignoni-Ponce, supra, at 2578.

The government cannot validly argue that the broad authority granted customs agents by Congress, through the passage of 19 U.S.C. 1581, automatically precludes Fourth Amendment considerations when a search or seizure pursuant to 19 U.S.C. 1581 is made by customs agents.

Clearly, in the instant case, there was a "seizure" for Fourth Amendment purposes, when customs agents and Louisiana State Police boarded the Respondents' vessel and demanded the production of documentation. Any action by customs agents in stopping and boarding vessels in inland waters constitutes a seizure as defined in the Fourth Amendment.

This Honorable Court held in United States v. Brignoni-Ponce, supra:

> "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); Terry v. Ohio, 392 U.S. 1, 16-19 88 S.Ct. 1868, 1877, 20 L. Ed.2d 889 (1968). 'Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person,' Id at 16, 88 S.Ct. at 1877 and the Fourth Amendment required that the seizure be 'reasonable'. As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security. Id at 20-21, 88 S.Ct. at 1879; Camara v. Municipal Court, 387 U.S. 523, 536-537, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967)."

The decision of the Fifth Circuit in this case was consistent with all of that Court's other decisions relating to the boarding of vessels in inland waters by customs agents. The reasonable suspicion requirement for such boardings was applied in these cases and tacitly approved by this Honorable Court in its denial of certiorari. See United States v. Serrano, 607 F.2d 1145, cert. denied 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); United States v. Castro, 596 F.2d 674, cert. denied 444 U.S. 963,100 S.Ct.

448, 62 L.Ed. 2d 375 (1979); United States v. Whitmire, 595 F.2d 1303, cert. denied, _____U.S._____, 100 S.Ct. 3048, 65 L.Ed. 2d 1136 (1979); United States v. D'Antignac, 628 F.2d 428, cert. denied, ____U.S.____, 101 S.Ct. 1485, 67 L.Ed. 2d 617 (1981).

The government charges that the Court of Appeal ignored the long history and pervasive nature of federal regulation and inspection of vessels on the nation's waters. In fact, the Fifth Circuit has recognized the rule established by this Honorable Court that government regulation of a means of transportation does not serve as a basis to disregard the Fourth Amendment constraints on the search or seizure of the conveyance be it an automobile or vessel. In the case of Delaware v. Prouse, 99 S.Ct. 1391 (1979), this Court held:

> "The 'grave danger' of abuse of discretion, United States v. Martinez-Fuerte, 428 U.S., at 559, 96 S. Ct., at 3083, does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police-citizen contact, Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973). Only last term we pointed out that 'if the government intrudes.... the privacy suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.' Marshall v. Barlow's, Inc., 436 U.S., at 312-313, 98 S.Ct. at 1820. There are certain 'relatively unique circumstances,' Id, at 313, 98 S.Ct. at 1820, in which consent to regulatory restrictions in presumptively concurrent with participation in the regulative enterprise. See U.S. v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972) (federal regulation of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (federal regulation of liquor). Otherwise, regulatory inspections unaccompanied by any quantum of any individualized, articulable suspicion must be undertaken pursuant to previously specified "neutral criteria." Marshall v. Barlow's, Inc., supra, 436 U.S., at 323, 98 S.Ct., at 1826.
>
> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities...."

The government argues that the standards of Prouse and Brignoni-Ponce have no proper application to boarding of vessels by customs officials.

The same Fourth Amendment considerations which were addressed by the Court in Brignoni-Ponce and Prouse are at issue in the instant case. The only difference is that the former cases involved automobiles while this case involves vessels. The government seizes on this difference in an attempt to distinguish Brignoni-Ponce and Prouse from this case. If the Fourth Amendment principles espoused in Brignoni-Ponce and Prouse are applied here, then the government has no valid argument.

Basically, the government argues that the difference between automobiles and vessels is significant for purposes of the application of Fourth Amendment constraints to governmental intrusions for the following reasons:

1. Automobile travelis a "basis pervasive and often necessary" mode of transportation in American life.

2. Other methods of spot checks, such as roadblocks, might be alternative to random stops of automobiles that could with equal effectiveness serve the regulatory purposes advanced to justify random stops.

3. Boardings of vessels are usually confined to the public or semi-public areas of a vessel, such as the weather decks, navigation spaces and the hold.

First of all, the aforementioned reasons deal only with the objective characteristics of the instrusion which occur when either an automobile or vessel is stopped by custsoms or Border Patrol agents. The Court has made it clear that if a fair standard of reasonableness is to be applied, then the subjective effects of a governmental intrusion must be considered. In Delaware v. Prouse, this Court held:

> "The constitutionality of stops by Border Patrol agents was again before the Court in United States v. Martinez-Fuerte, supra, in which we addressed the permissibility of checkpoint operations. This practice involved slowing all oncoming traffic 'to a virtual,

if not a complete, halt,' 428 U.S. at 546, 96 S.Ct., at 3078, at a highway roadblock, and referring vehicles chosen at the discretion of Border Patrol agents to an area for secondary inspection. See Id., at 546, 558, 96 S.CT., at 3077, 3083. Recognizing that the governmental interest involved was the same as that furthered by roving-patrol stops, the Court nonetheless sustained the constitutionality of the Border Patrol's checkpoint operations. The crucial distinction was the lesser intrusion upon the motorist's Fourth Amendment interests:

> 'The objective intrusion-the stop itself, the questioning, and the visual inspection-also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion-the generating of concern or even fright on the part of lawful travelers-is appreciably less in the case of checkpoint stop.' Id., at 558, 965, S.Ct. at 3083.'

Although not dispositive, these decisions undoubtedly provide guidance in balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case...."

"...We cannot assume that the phsycial and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt and all are subjected to a show of the police power of the community..." Delaware v. Prouse at 1397, 1398. (Emphasis added).

The random stopping and boarding of vessels, be they commercial or pleasure craft, by roving patrols of customs agents would generate a greater amount of concern and fright on the part of lawful travelers than the stopping of automobiles. The subjective expectation of privacy is greater for one in a vessel traveling the lakes and rivers of this country than for an individual in an automobile traveling on a highway. Many people take to the rivers and lakes in vessels for the specific purpose of finding privacy, quiet and recreation.

In Louisiana, as well as the other Gulf Costs States, which make up the Fifth and Eleventh Circuits, the use of vessels and boats is very significant due to the unique geographic features of these states. Thousands of vessesl, both commercial and pleasure craft, traverse the myriad lakes, rivers, and bayous of these states everyday of the year. Boat travel in these states can be characterized as "basic, pervasive and often necessary" for purposes of deciding whether Fourth Amendment constraints on the random stopping and boarding of vessels in inland waters should be applied. The same rationale applied by the Court in Brignoni-Ponce is applicable here:

> "We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well."

It is significant to note at this point that the Henry Morgan, II was initially sighted by customs agents some twenty miles inland from the coast of Louisiana and there was absolutely no indication that it had recently crossed the border.

The Court continued:

> "We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers."

The reasonable suspicion test which was applied by the Fifth Circuit in this case and others is very limited. It is only applicable when the vessel to be boarded is initially sighted in inland waters and there is no evidence which would allow the officers to reasonably suspect that the vessel had recently crossed the border. The government has offered no proof that the applications

of this rule has "seriously impaired the ability of the customs service to fulfill its enforcement, responsiblity on the nation's inland waterways and to police traffic across its borders." The contrary is true as shown by footnote 8 of the government's own petition which provides that in 1980 and 1981 customs officers conducted a total of 4,424 boardings on inland waters. This is a substantial number of boardings for this amount of time. There is no allegation that any of these boardings were made more difficult by the application of the reasonable suspicion test.

As stated previously, this test has been in effect in the Fifth Circuit for years and the Court of Appeal has upheld the validity of numerous boardings of vessels in inland waters which resulted in a discovery of customs violations. See United States v. Castro, supra; United States v. Serrano, supra; United States v. Whitmire, supra.

The functions and duties of the customs service can be effectively carried out without the necessity of allowing roving bands of customs patrols to make random stops and boardings of vessels in inland waters. Contrary to what the government contends, vessels are required under state law to exhibit various registration numbers which render identifying information. Computer checks on the origin of vessels can and have been made by customs agents in the past. See United States v. Castro, supra.

Moreover, the nature and characteristics of illegal importation of contraband, especially drugs, tends to generate articulable grounds for identifying violators. This is of great significance as illustrated by the Court's decision in Brignoni-Ponce which provided:

> "...the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate offical interference..."

External observation by experienced customs agents can result in the detection of characteristics which would provide a reasonable suspicion that a vessel was engaged in the smuggling of contraband. These characteristics were utilized by customs agents to establish a reasonable suspicion which was found in cases decided by the Court of Appeal to be sufficient to authorize the boarding of certain vessels in inland waters. These characteristics included "riding low in the water"; making a large or heavy bow wake; throwing a large bow spray; and having crystals encrusted on the bow. See United States v. Whittaker, 592 F.2d 826 (5th Cir. 1979); United States v. Whitmire, 595 F.2d. 1303, (5th Cir. 1979).

Finally, the fact that customs boardings are usually confined to the public or semi-public areas of a vessel does not serve as a valid basis for disallowing Fourth Amendment constraints on the random stopping and boarding of vessels in inland waters.

The type of intrusion which occurred in Brignoni-Ponce is much less severe than the intrusion which accompanies a stop and boarding of a vessel. In Brignoni-Ponce, the Court was dealing with a stop of an automobile which usually consumed no more than a minute. There was no search of the vehicle or its occupants and the visual inspection was limited to those parts of the vehicle that would be seen by anyone standing alongside. Despite this, the Court ruled that border patrols could make these stops only if they had a reasonable suspicion that the vehicle contained illegal aliens.

In comparison, the type of intrusion we are dealing with here, would require a stop which consumed much more than a minute as well as a physical boarding of the vessel itself. Yet the government would have this Court rule that such intrusions could be made at any time and place in the United States without any Fourth Amendment constraints. Such an enormous grant of power would operate to deprive and inhibit the right of Americans to be free from unreasonable searches and seizures and arbitrary interference by law officers.

The respondents have been deported and the possibility that there could be a subsequent apprehension of them in the United States is practically nil. Counsel knows only that they are no longer in this country and he presently has no information concerning where they can be contacted. In veiw of these facts, it is submitted that the instant case is moot. See United States v. Sarmiento-Rozo, 592 F.2d 1318 (5th Cir. 1979).

CONCLUSION

The Petition For a Writ of Certiorari should be denied and the decision of the Court of Appeal affirmed.

Respectfully submitted,

BY: Richard P. Ieyoub

RICHARD P. IEYOUB
512 Pujo Street
Lake Charles, LA 70601

C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing Response to Petition For A Writ of Certiorari has been mailed, postage prepaid and properly addressed to Rex E. Lee, D. Lowell Jensen, Andrew L. Frey and Elliott Schulder.

Lake Charles, Louisiana, this 6th day of May, 1982.

Richard P. Ieyoub

RICHARD P. IEYOUB

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

UNITED STATES OF AMERICA, PETITIONER

V.

JOSE REYNALDO VILLAMONTE-MARQUEZ AND
ROBERT SORTGESE HAMPARIAN,
RESPONDENTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents move the Court for an order permitting them to file this response to Petition For A Writ of Certiorari in forma pauperis, and in support thereof attaches the affidavit of counsel for respondents.

RICHARD P. IEYOUB
512 Pujo Street
Lake Charles, LA 706[illegible]
Attorney For Respondents

O R D E R

Let the respondents proceed without prepayment of costs or fees or the necessity of giving security therefore.

_____
SUPREME COURT JUSTICE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

UNITED STATES OF AMERICA, PETITIONER

V.

JOSE REYNALDO VILLAMONTE-MARQUEZ AND
ROBERT SORTGESE HAMPARIAN,
RESPONDENTS

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

I, Richard P. Ieyoub, being first duly sworn, depose and say that I served as counsel for respondents in the above entitled case; that in support of my Motion to file this response to the Petition For A Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that while representing respondents they had no personal funds and at the present time respondents are no longer in this country and I do not know where they can be contacted.

Richard P. Ieyoub
RICHARD P. IEYOUB

SWORN TO AND SUBSCRIBED BEFORE ME, this 5th day of May, 1982.

Susan E. Wade
NOTARY PUBLIC

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1350

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ
AND ROBERT SORTGESE HAMPARIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1350

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AND ROBERT SORTGESE HAMPARIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Before turning to a response to the arguments made in opposition to the petition in this case, we stress that those arguments nowhere respond to the most obvious and fundamental reason why review by this Court is appropriate in the present case. Congress has stated in 19 .S.C. 1581(a) that "[a]ny officer of the customs may at ny time go on board of any vessel * * * at any place in the United States * * * and examine the manifest and other documents and papers * * *." To the same effect, Congress has provided in 46 U.S.C. 277 that "[a]ny officer concerned in the collection of the revenue may at all times inspect the register or enrollment or license of any vessel * * *." The court of appeals, however, has said that Customs officers may not do what Congress has specifically authorized them to do except when they are aware of facts giving rise to a reasonable suspicion of a violation of law. Whether the Fourth

Amendment in fact requires invalidation of the command of Congress in these statutes is a question of obvious importance fully justifying consideration by this Court.

1. Contrary to respondents' mischaracterization of our position (Br. in Opp. 7), we have not attempted to argue that the broad statutory authority granted to Customs officers to board any vessel at any place in the United States in order to inspect the vessel's documents and papers "automatically precludes" consideration of the reasonableness of suspicionless Customs boardings under the Fourth Amendment. Instead, the essence of our position is that statutorily authorized Customs boardings for document checks comport with the Fourth Amendment's standard of reasonableness even in the absence of particularized suspicion that a vessel is not in compliance with applicable laws.

As we have shown in the petition (at 13-16), federal regulation and inspection of vessels on the Nation's waters dates back to the earliest years of the Republic. This long history of regulation demonstrates that Congress, at the time the Fourth Amendment was adopted, did not consider suspicionless Customs boardings to be unreasonable. Furthermore, the long history of close federal supervision in this area shows that persons on board vessels that are subject to Customs regulation have no reasonable expectation of freedom from Customs boardings pursuant to statute.

Respondents do not address our historical argument. Rather, they point out (Br. in Opp. 8) that automobiles have been subject to extensive regulation by state authorities and that this Court nevertheless held in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), that the Fourth Amendment prohibited random stops of motor vehicles by state and local police for license and registration checks. But, unlike this case, the Court in *Prouse* was not confronted with strong historical evidence that supported the conclusion that the

particular law enforcement conduct in question was reasonable under the Fourth Amendment. While automobiles were traditionally regulated in many respects, that regulation did not include general recognition of a right to make random, suspicionless stops of vehicles on the highway. Moreover, the analysis in *Prouse* with regard to stops of automobiles cannot be superimposed uncritically on stops of nautical vessels for the reasons discussed in the petition (at 18-21).

2. There is no merit to respondents' assertion (Br. in Opp. 12) that the Customs Service can carry out its mission without conducting suspicionless stops and boardings of vessels on inland waters. As we pointed out in the petition (at 20-21), there is no nautical analogue to dated license plates or registration stickers for vessels documented by the federal government. The Third Circuit has summarized the elements of federal vessel regulation:

> Federal statutes provide for registration of vessels engaged in foreign trade, 46 U.S.C. §11 (1976), and for enrollment of vessels engaged in the coasting trade or fisheries. 46 U.S.C. §§251-52 (1976). Only United States vessels may be enrolled, and an unenrolled fishing vessel may not, except as provided by a treaty, land its catch in a port of the United States. 46 U.S.C. §251(a) (1976). Registration or enrollment results in documentation, and the Commissioner of Customs maintains a system of numbering documented vessels. Every documented vessel must have her number "deeply carved or otherwise permanently marked on her main beam." 46 U.S.C. §45 (1976). The name of every documented vessel must be marked upon each bow and the stern, and the vessel's home port must be marked upon the stern. 46 U.S.C. §46 (1976). The

> home port must also be shown on the register or enrollment of the vessel, which document is referred to as the vessel's "document." 46 U.S.C. §18 (1976).

United States v. *Demanett*, 629 F. 2d 862, 866 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981).

Thus, contrary to respondents' suggestion (Br. in Opp. 12), the mere observation of a name and home port displayed on a vessel will not provide the information necessary for a useful document check. As the Third Circuit remarked in *United States* v. *Demanett, supra*, 629 F. 2d at 866, "[o]bviously, the federal documentation scheme, of which the vessel's main beam number has always been a key feature, would not be enforceable without some boarding authority." In addition, state registration numbers do not conform to the uniform federal documentation scheme, and even if they did, the numbers could not reveal whether a vessel is being operated in conformance with its permits and enrollment, or whether the vessel has come from a foreign port. Similarly, resort to a computer check on a vessel's origin and documentation will not ordinarily disclose whether the vessel has made an entry or is being operated within limits established by its documentation.

Moreover, the mere fact that reasonable suspicion has been found to support Customs stops of vessels in a number of cases does not mean, as respondents suggest (Br. in Opp. 11-12, 13), that Customs officers will not be seriously hampered in their enforcement responsibilities by the imposition of a reasonable suspicion requirement for stops of vessels on inland waters. There is no basis for respondents' assumption (Br. in Opp. 12) that the figures regarding Customs boardings on inland waters cited in footnote 8 of the petition involved only boardings supported by reasonable suspicion.

In this connection, respondents' assertion that the reasonable suspicion standard for inland waters boardings "has been in effect in the Fifth Circuit for years" (Br. in Opp. 12) is mistaken. Prior to the decision below, the Fifth Circuit, in a series of cases in which reasonable suspicion was present, had upheld Customs boardings of vessels initially sighted on inland waters. *United States* v. *Whitmire*, 595 F. 2d 1303 (1979), cert. denied, 448 U.S. 906 (1980); *United States* v. *Castro*, 596 F. 2d 674, 676, cert. denied, 444 U.S. 963 (1979); *United States* v. *Kleinschmidt*, 596 F. 2d 133, 135-136, cert. denied, 444 U.S. 927 (1979); *United States* v. *Serrano*, 607 F. 2d 1145, 1147-1148 (1979), cert. denied, 445 U.S. 965 (1980). But in none of these cases did the court hold that the Fourth Amendment *required* boardings on inland waters to be supported by reasonable suspicion. Thus, in *Castro*, the court expressly declined to reach the question whether the statutory authority for boardings contained in 19 U.S.C. 1581(a) is constitutional insofar as it permits Customs agents to board vessels on inland waters absent reasonable suspicion. 596 F. 2d at 676. In *Kleinschmidt* the court noted that even if the standards of *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *Delaware* v. *Prouse*, *supra*, requiring reasonable suspicion for an investigatory stop of an automobile, were applicable to nautical vessels, "such reasonable suspicion was present in this case." 596 F. 2d at 135. Similarly, in *Serrano*, the court observed that it had not decided whether random Customs boardings for document checks would be permissible on inland waters. 607 F. 2d at 1148. In *Whitmire*, after an extensive analysis, the court noted that a balancing of the private and governmental interests "might in the proper case support a blanket authorization of customs personnel to briefly halt vessels sighted in intercoastal waterways for random document and safety boardings." 595 F. 2d at 1315. The court did not have to reach the question, however

because it found that the boarding in that case was accompanied by reasonable suspicion. *Id.* at 1315-1316.[1]

In *United States* v. *D'Antignac*, 628 F. 2d 428 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981), the court also upheld a Customs boarding on inland waters after finding reasonable suspicion. The court stated in dictum, however, that absent a border search rationale the constitutionality of a Section 1581(a) boarding on inland waters turns on "a limited investigatory stop based upon a reasonable suspicion of law violation." 628 F. 2d at 433. In this case, the court of appeals elevated this dictum into a constitutional requirement, without consideration of any of the pertinent governmental interests supporting suspicionless boardings, or of the long history of governmental regulation in this area. Furthermore, as noted in the petition (at 12-13), the decision below is difficult, if not impossible, to reconcile with numerous decisions sustaining suspicionless boardings of vessels on the high seas or in customs waters for the purpose of conducting document or safety inspections pursuant to statutory authority.

3. Finally, respondents contend (Br. in Opp. 9-10), in reliance on *Delaware* v. *Prouse*, *supra*, 440 U.S. at 656-657, and *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), that the Fourth Amendment requires that stops of vessels be justified by reasonable suspicion because the subjective

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[1]Similarly, the other circuits that have upheld boardings of vessels on inland waters for document checks on the basis of reasonable suspicion have not been called upon to rule whether a boarding undertaken without reasonable suspicion violates the Fourth Amendment. See *United States* v. *Demanett*, *supra*; *United States* v. *Watkins*, 662 F. 2d 1090, 1095-1096 (4th Cir. 1981), cert. denied, No. 81-1228 (Mar. 1, 1982); *Blair* v. *United States*, 665 F. 2d 500, 504-506 (4th Cir. 1981). In *Watkins*, for example, the Fourth Circuit stated that, because reasonable suspicion of a customs violation was present, it was not necessary to "address the question * * * whether a stop can be made in inland waters without reasonable suspicion." 662 F. 2d at 1095-1096.

intrusion involved in random stops and boardings of vessels is allegedly greater than that involved in stops of automobiles. If petitioners are correct, then it would appear that the reasonable suspicion standard should also be applicable to stops of vessels in customs waters or on the high seas; however, the Fifth Circuit and other courts have declined to so hold.[2] In addition, respondents' premise (Br. in Opp. 10) that the stopping of vessels "would generate a greater amount of concern and fright on the part of lawful travelers than the stopping of automobiles" is mistaken.[3] As the Fifth Circuit itself observed in *United States* v. *Whitmire, supra*, 595 F. 2d at 1313 (footnotes omitted):

> the potential for provoking fear in the stopped citizen that worried the Supreme Court in recent automobile search cases seems less likely to attend maritime intrusions. The heavy overlay of maritime law and the long practice of regulatory stops, inspections and searches

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[2]But cf. *United States* v. *Streifel*, 665 F. 2d 414, 419-424 (2d Cir. 1981) (upholding stop and boarding of foreign flag vessel on the high seas to investigate drug smuggling where reasonable suspicion was present).

[3]We note that in *United States* v. *Piner*, 608 F. 2d 358, 361 (9th Cir. 1979), the Ninth Circuit, citing *United States* v. *Martinez-Fuerte, supra*, and *Delaware* v. *Prouse, supra*, relied on the degree of subjective intrusion occasioned by the nighttime stop and boarding of a vessel in concluding that a stop and boarding after dark for a safety and registration inspection must either be supported by reasonable suspicion of noncompliance with applicable safety or registration requirements or be conducted in accordance with neutral administrative standards so that the decision to board is not left to the sole discretion of the officer. Although the boarding in *Piner*—like that in this case—occurred on inland waters, *Piner* does not support respondents' position. In *Piner*, the court assumed that a random stop during daylight hours for a safety and documentation check would be permissible under the Fourth Amendment. *Id.* at 361. Here, the stop and boarding of respondents' vessel was carried out during daylight. Thus, the decision below—requiring reasonable suspicion for daytime boardings—is inconsistent with the Ninth Circuit's analysis in *Piner*.

by these officers, while not dispositive of the constitutional question, must, in addition to coloring our constitutional balancing, lead us to suspect that the approach of a governmental vessel to a private boat on the waters may not be as startling as that of a roving Border Patrol car to an unsuspecting citizen cruising our national highways. On the contrary, boaters customarily expect the presence of and rely on aid from coast guard or customs vessels when facing the perils of a maritime environment. It is quite possible, therefore, that smugglers form the main class of sailors in whom the approach of these officers provokes anxiety.

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. In the alternative, for the reasons set forth in the petition (at 21-22), the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for consideration of mootness.

REX E. LEE
Solicitor General

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Petitioner's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ and
ROBERT SORTGESE HAMPARIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the authority granted Customs officers by 19 U.S.C. 1581 and 46 U.S.C. 277 to board vessels on inland waters for the purpose of inspecting the vessels' documents violates the Fourth Amendment whenever the boarding is made without a reasonable suspicion of a violation of law.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 652 F.2d 481. The oral ruling of the district court on respondents' motion to suppress (Pet. App. 17a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a-22a) was entered on August 3, 1981. A petition for rehearing was denied on October 19, 1981 (Pet. App. 23a-24a). Justice White extended the time for filing a petition for a writ of certiorari to and including January 17, 1982 (a Sunday). The petition was filed on January 18, 1982, and was granted on June 7, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

The constitutional provision, statutes, and regulation involved are reproduced in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, respondents were convicted of importation of marijuana, in violation of 21 U.S.C. 952(a), possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit each of those offenses, in violation of 21 U.S.C. 846 and 963.

1. Prior to trial, respondents moved to suppress approximately 5,800 pounds of marijuana seized by Customs officers following a boarding of their vessel. The pertinent evidence (see Pet. App. 2a-5a) showed that on the evening of March 5, 1980, a Customs officer received information from a reliable informant that two vessels loaded with marijuana and manned by persons speaking a foreign language were in the vicinity of Hackberry and Cameron, Louisiana (H. Tr. 6-7).[1] Both Hackberry and Cameron are small fishing villages located on the Calcasieu River Ship Channel, a waterway that runs from the Gulf of Mexico to Lake Charles, Louisiana. Lake Charles, which is located about 50 land miles from the entrance to the ship channel near Cameron (H. Tr. 43), is designated as a Customs port of entry in the Houston, Texas region (see 19 C.F.R. 101.3). All vessels coming from foreign waters and headed for the Customs house at Lake Charles must traverse the Calcasieu River Ship Channel (H. Tr. 97-98).

As a result of the informant's tip, Customs officers, aided by officers of the Louisiana Department of Wildlife and Fisheries, began a land and water patrol of the area (H. Tr. 71-72). Shortly after midnight, in a nearby

[1] "H. Tr." refers to the suppression hearing transcript.

intracoastal waterway, the officers discovered a small boat running without lights in violation of navigation laws (H. Tr. 15-16, 73). The gasoline-powered boat was carrying some new tarpaulins, a walkie-talkie radio, and three new five-gallon fuel cans, two of which contained diesel fuel (H. Tr. 17-18, 74). Although the operator of the boat claimed to be going fishing, no fishing gear was observed on the boat (H. Tr. 18).

Later that morning Customs Officer Loren Wilkins and state officers resumed their patrol on the Calcasieu River Ship Channel (H. Tr. 76-77). At about 11:30 a.m., the officers observed a 40-foot sailboat anchored on the west side of the ship channel, approximately 18 miles inland from the coast (H. Tr. 26-27, 77; June 2, 1980 Tr. 126). Wilkins had never before seen a sailboat in the ship channel (H. Tr. 77-78). As the patrol boat proceeded in the direction of the sailboat, the officers observed a large freighter heading north up the channel, toward the Port of Lake Charles, creating a huge wake that caused the sailboat to rock so violently from side to side that the officers believed it was about to capsize (H. Tr. 27-29, 78-79). As the patrol boat passed behind the sailboat, the officers observed on the stern of the vessel the name *"Henry Morgan II"* and the home port "Basilea," which Wilkins believed to be a foreign port (H. Tr. 29, 79).[2] Officer Wilkins then observed an individual on the deck of the sailboat. In a loud voice, Wilkins asked the man, later identified as respondent Hamparian, if he was all right. Hamparian merely shrugged his shoulders and lifted his hands without responding (H. Tr. 30-32, 79-82). Based on the vessel's designated home port, the apparent inability of the person on board to understand English, and the unusual location of the vessel, Officer Wilkins believed that the sailboat was foreign, and he decided to board the boat to check its documentation (H. Tr. 82, 112-113). Wilkins sought to ascertain whether the sail-

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[2] "Basilea" is the Latin translation for Basel, Switzerland. *Lippincott Gazeteer of the World* 171 (A. & L. Heilprin ed. 1931).

boat in fact was of foreign registry or had come from foreign waters and, if so, whether it had reported to Customs (H. Tr. 103).

After the patrol boat maneuvered into position alongside the *Henry Morgan II*, Wilkins displayed his badge to respondent Hamparian, identified himself as a Customs officer, and boarded the boat, accompanied by state police officer Dougherty (H. Tr. 35, 56, 84). In response to Wilkins' request for the boat's papers, respondent Hamparian produced a document, written in French and dated February 6, 1980, that appeared to be a request to change the registration of a vessel from Swiss to French registry (Pet. App. 4a). While talking to respondent Hamparian, Wilkins detected the odor of burning marijuana and asked if Dougherty also smelled it (H. Tr. 38-39, 86-87). After Dougherty responded in the affirmative, Wilkins looked through an open door hatch and observed numerous burlap-wrapped bales (H. Tr. 39-40, 87). Respondent Villamonte-Marquez was lying on a sleeping bag on top of the bales (H. Tr. 60-63). Respondents were arrested, and a total of approximately 5,800 pounds of marijuana was found on board the vessel.

The district court denied respondents' motion to suppress, concluding that the boarding of the sailboat to check its documents was justified because the facts known to Officer Wilkins gave rise to reasonable suspicion of a customs violation (Pet. App. 19a-20a). The court further concluded that the odor of marijuana detected by the officers once they were lawfully on board provided probable cause to search the vessel (*id.* at 20a).

2. The court of appeals reversed (Pet. App. 1a-16a). The court acknowledged (*id.* at 6a) that 19 U.S.C. 1581(a) provides Customs officers with broad authority to "go on board of any vessel * * * at any place in the United States or within the customs waters * * * [to] examine the manifest and other documents and papers." However, the court held that a Customs boarding of a

vessel on inland waters[3] pursuant to Section 1581(a), for the purpose of checking the vessel's documents, violates the Fourth Amendment unless the boarding is justifiable either under a border search rationale or as an "investigatory stop" based on reasonable suspicion of illegal activity (Pet. App. 9a). The court concluded that the boarding could not be upheld as a border search because, in the court's view, at the time of the boarding, which took place 18 miles inland (but still some 30 miles seaward of the port of entry at Lake Charles), the officers had no reason to believe that the vessel had crossed the border (*id.* at 10a-12a). Turning to the question whether the boarding was supported by reasonable suspicion, the court of appeals concluded that "[n]one of the 'articulable facts' cited by the district court even arguably support[s] the required reasonable suspicion of law viola-

[3] International law recognizes essentially four types of waters, each subject to varying degrees of control by nations. On inland waters, which include rivers, harbors, bays and other waters landward of the coastline, a nation may enforce its law exactly as on land. Moving seaward, the next category is the "territorial sea," which the United States recognizes as those waters within three nautical miles of the coast. See *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122-123 (1923). In territorial seas, the nation may enforce its law just as it does on land and on inland waters, except that it must grant foreign vessels the right of innocent passage; once landward of the territorial sea and within inland waters, however, those vessels are wholly subject to United States law. *Id.* at 125-126. The high seas lie seaward of the territorial sea. International law recognizes a portion of the high seas called the contiguous zone in which a nation may exercise limited jurisdiction, such as enforcement of customs and immigration laws. The contiguous zone may not extend more than 12 miles from the baseline from which the breadth of the territorial sea is measured. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Art. 24, 15 U.S.T. 1606, 1612, T.I.A.S. No. 5639. In United States law, the area within the 12-mile limit is referred to as "customs waters." See 19 U.S.C. 1401(j). Finally, on the high seas beyond the contiguous zone, vessels are generally subject to the exclusive jurisdiction of their flag states, with limited exceptions permitted by fisheries management, continental shelf exploration, or treaty arrangement. The seas beyond the contiguous zone are international waters, which are subject to the sovereignty of no nation. However, each nation may

tion" (*id.* at 13a).[4] After analyzing each of these facts separately, the court determined that "[t]he facts could support nothing more than a generalized suspicion and speculation in the minds of the officers" (*id.* at 16a), and it accordingly held that the boarding of the vessel was unreasonable under the Fourth Amendment.[5]

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assert full jurisdiction over vessels that it has registered while they are on the high seas. See generally *United States* v. *Warren*, 578 F.2d 1058, 1064-1065 n.4 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980); *United States* v. *Williams*, 617 F.2d 1063, 1073 n.6 (5th Cir. 1980) (en banc).

[4] The five facts on which the district court relied in support of its finding of reasonable suspicion were (Pet. App. 19a-20a; see *id.* at 12a-13a):

> (1) the information from a reliable informant that two boats with foreigners would be in the Hackberry-Cameron area with marijuana on board;
>
> (2) the discovery of the small boat operating without running lights and carrying cans containing diesel fuel;
>
> (3) the sighting of the *Henry Morgan II* in the ship channel where the officers had never before seen a sailing vessel anchored;
>
> (4) the name of the sailboat's home port appeared to be foreign;
>
> (5) respondent Hamparian's actions in shrugging his shoulders and failing to speak in response to Officer Wilkins' question which indicated that Hamparian did not understand the question and might have been a foreigner.

[5] The district court subsequently dismissed the indictment and released respondents to the custody of the Immigration and Naturalization Service (J.A. 2). They were then deported.

Dismissal of the indictment and respondents' release to the custody of the INS—actions taken in compliance with the court of appeals' mandate—do not deprive this Court of jurisdiction. See *e.g.*, *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931). Neither does respondents' subsequent deportation render this case moot. Respondents were sentenced to substantial terms of imprisonment, which they have not served. If this Court reverses the judgment of the court of appeals, respondents' convictions will be reinstated. They may then be subject to extradition. Even if respondents are beyond the reach of United States law at present, if they returned to this country following reinstatement of their sentences, they could be arrested and com-

SUMMARY OF ARGUMENT

Congress has conferred upon Customs officers the unambiguous authority "at any time [to] go on board of any vessel * * * at any place in the United States or within the customs waters * * * and examine the manifest and other documents and papers * * and to this end [to] hail and stop such vessel * * *." 19 U.S.C. 1581(a). Pursuant to this and related statutory authority (19 U.S.C. 1581(b), 46 U.S.C. 277), respondents' boat was boarded, and (without further search) a large quantity of marijuana was discovered. By ruling that such a boarding, when made in inland waters (here a ship channel leading from the high seas to a customs port of entry), must be supported by a particularized, reasonable suspicion of illegality, the court of appeals has effectively declared unconstitutional a critical component of the framework of laws and practices employed to enforce a broad range of laws relating to navigation and maritime commerce to and within the United States.

The court reached this result by equating the boarding of vessels with stops of automobiles. In so doing, it overlooked a host of substantial differences between the two contexts that make the practice of suspicionless boardings of vessels reasonable when similar conduct with respect to land vehicles would be unjustifiable.

1. There is a venerable history of maritime regulation, going back to the First Congress, reflecting a consistent understanding that vessels subject to the jurisdiction of the United States, wherever located, would be subject to suspicionless boarding by Customs officers for purposes of document checks. The direct statutory predecessor of 19 U.S.C. 1581 was enacted in 1790. By contrast, statutes adopted at the same time relating to customs searches on

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pelled to complete those sentences. Accordingly, it is apparent that the present case still presents a live controversy. See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977) (prosecution's appeal from reversal of criminal conviction not moot, even though defendant had completed his sentence, because reversal prevented state from imposing collateral consequence of conviction).

land, while conveying broad powers to stop and search, nevertheless required "suspicion" and, in the case of building searches, warrants. The understanding at the founding of the Republic that vessels in United States waters were subject to boarding by Customs without a particularized basis for suspecting wrongdoing or irregularity is weighty evidence that continuation of the practice today does not violate the Fourth Amendment.

2. The regulation of maritime activities is not only longstanding, but extensive as well. Initially designed to enforce federal customs laws and collect revenue from licensing and registration fees, the purposes of the system of regulation have gradually expanded to include vessel safety, regulation of fishing activities, conservation of natural resources, and a broad range of other objectives. At the heart of this web of regulations are various documentation requirements, including: the certificate of documentation, which is the basic identification document for the vessel; federally issued licenses authorizing a vessel to engage in certain maritime trades, such as commercial fishing; the manifest, which is the basic document employed in regulating the entry of persons and goods into the country; and inspection certificates issued by the Coast Guard with respect to the safety and fitness of vessels for their intended service. This Court has recognized that the reasonableness of suspicionless and warrantless searches may be established with respect to activities that are subjected to longstanding and/or extensive patterns of government regulation even though the same government investigative activity would be deemed unreasonable in less regulated areas.

3. Even if the venerable origin of 19 U.S.C. 1581(a) is not conclusive proof of constitutionality, boardings and document inspections conducted pursuant to that authority satisfy Fourth Amendment standards because the need for such procedures far outweighs their effect upon legitimate privacy interests.

As noted, the vessel documentation laws serve many important purposes, including identification of vessels, collection of import and tonnage duties, regulation of the

entry and departure of persons and goods travelling by water, protection of American labor and industry, conservation of natural resources, and promotion of safe shipping and boating.

These laws could not be enforced effectively if Customs officers were not permitted to board a vessel and inspect its documents without having a reasonable suspicion of illegality. Whether a vessel is complying with even the most rudimentary documentation laws usually cannot be determined merely by observing its activities or its exterior markings. In this respect, vessels differ dramatically from land vehicles. For example, it is often impossible to determine from a vessel's outward markings whether it is a United States or foreign vessel and whether, if it is the former, it is required to be federally documented or has fulfilled those requirements. Furthermore, a vessel's exterior markings do not reveal whether its documentation is current, whether the vessel is licensed for a particular trade, whether it is engaged in domestic or foreign travel, whether it has a manifest or certificate of inspection, and whether it has made entry or clearance or is required to do so.

Means of enforcing the documentation laws other than suspicionless boardings are unsatisfactory. Permanent nautical checkpoints are impractical. Checking with the documentation office by radio is not fully effective for a variety of reasons including the fact that the exterior markings on vessels are not reliable. Inspecting vessels only when they are in port is not satisfactory because vessels may operate in United States waters for long periods without putting into a United States port.

Boardings and inspections such as that in the present case are especially important because of the vital role they play in policing the borders. While persons and goods entering this country by land may be thoroughly searched at the border, such searches are impractical at the sea border, which is located three miles from shore. Once a vessel crosses that imaginary line in the water (and a vessel can do so easily without observation), it will usu-

ally become indistinguishable from other craft and may thereby evade the requirement of entry with Customs. Thus, only by boarding vessels and examining their documents to determine whether entry is required or has been made can Customs officers effectively regulate persons and goods coming into this country by sea.

4. On the other side of the balance, boardings and inspections such as those involved in this case do not intrude upon important Fourth Amendment interests. They do not take much time, and the portions of the vessel visited by the boarding officers are restricted. Moreover, the legitimate privacy expectations of persons on vessels are greatly diminished because shipping and boating have long been subject to close regulation. For the last two centuries, persons setting out in a vessel have known and expected that they might be stopped and boarded for document or other inspections.

For these reasons and others, a stop and boarding of a vessel is not reasonably equated with a stop of an automobile. Ships and boats do not play the same unique and central role as automobiles in the life of the average person. Travel by vessel, unlike automobile travel, is not "a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities" (*Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979)). Boardings of vessels are also distinguished from vehicular stops because persons on vessels customarily expect the presence of and rely on aid from Coast Guard or Customs vessels when facing the perils of a maritime environment. Thus, the approach of such a vessel, unlike the police officer signalling a motorist to pull over, is usually a welcome sight for persons other than smugglers.

5. All of the foregoing considerations have led the Fifth Circuit in other cases to uphold suspicionless boardings on the high seas and in the customs waters. There is no rational basis for distinguishing the inland waters, especially where, as here, the boarding occurs in waters seaward of the customs port of entry. In sum, Customs' need to make routine or suspicionless boardings of vessels

in inland waters for the purpose of inspecting their documents far outweighs the effect of such boardings and inspections upon legitimate privacy interests. Such boardings and inspections are therefore reasonable and do not violate Fourth Amendment standards.

ARGUMENT

This case concerns the authority of a Customs officer to board a vessel on inland waters and check its documentation without having a reasonable suspicion that the vessel has been employed in an unlawful activity or has crossed the border. It is not contended (see Pet. App. 10a) that there was any illegality after the officer boarded the vessel in this case and asked to inspect its documents.[6] Thus, the only issue here is the legality of the suspicionless boarding and request for documents; the case does not involve the right of Customs officers, without probable cause or reasonable suspicion, to search an entire vessel, its cargo, machinery, or living spaces, or the personal belongings of those on board.

Customs' authority to conduct suspicionless boardings and document checks on inland waters is expressly conferred by several partially overlapping statutes. The most important of these, 19 U.S.C. 1581(a), unambiguously provides that Customs officers "may at any time go on board of any vessel * * * at any place in the United States * * * and examine the manifest and other documents and papers * * *." See also 19 U.S.C. 1581(b);

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[6] It is immaterial whether the officers boarded the vessel and asked to inspect its documents solely for the purpose of enforcing the documentation laws or because they suspected drug smuggling. See, *e.g.*, *United States* v. *Watson*, 678 F.2d 765, 770-771 (9th Cir. 1982); *United States* v. *Arra*, 630 F.2d 836, 845-846 (1st Cir. 1980); *United States* v. *Demanett*, 629 F.2d 862, 868-869 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); cf. *Scott* v. *United States*, 436 U.S. 128, 136 (1978). Moreover, since smuggling almost always entails documentation law violation, the two purposes are not in practice separable.

46 U.S.C. 277.[7] Not only is there no hint in the statutory language that Congress contemplated that such boardings and inspections would require probable cause or reasonable suspicion—a construction wholly inconsistent with the words "at any time" and "any vessel"—but as we will show, the legislative history of this provision's statutory predecessors clearly refutes any such construction. That 19 U.S.C. 1581(a) encompasses boardings on inland waters is equally plain, since the statute applies to "any vessel * * * at any place in the United States." Thus, this case squarely presents the question whether a clear grant of statutory authority comports with the Fourth Amendment.

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[7] 19 U.S.C. 1581(b) empowers officers of the Treasury Department (including Customs officers (19 U.S.C. 2071)) and other authorized persons to "go on board of any vessel at any place in the United States or within the customs waters and hail, stop and board such vessel in the enforcement of the navigation laws." While this provision does not expressly authorize the inspection of documents, 46 U.S.C. 277 empowers "[a]ny officer concerned in the collection of the revenue * * * at all times [to] inspect the register or enrollment or license of any vessel or any document in lieu thereof."

The reason for the enactment of 19 U.S.C. 1581(b), which overlaps 19 U.S.C. 1581(a) to a considerable degree, is explained in *Maul* v. *United States*, 274 U.S. 501, 527 n.31 (1927) (Brandeis and Holmes, JJ., concurring). Before 1903, the Treasury Department (which included Customs, the Bureau of Navigation, and the Revenue Cutter Service) was charged with the administration and enforcement of the navigation laws. The Bureau of Navigation was transferred to the new Department of Commerce and Labor in 1903 and to the new Department of Commerce in 1913. The predecessor of 19 U.S.C. 1581(b)—Tariff Act of 1922, ch. 356, Section 581, para. 2, 42 Stat. 979—was added to permit boardings by "officers of the Department of Commerce." However, the administration of the navigation laws was returned to the Treasury Department (which then included the Coast Guard) in the 1940's (see Reorganization plan No. 3 of 1946, 5 U.S.C. App. 101-104; Exec. Order No. 9082, 7 Fed. Reg. 1609 (1942)). Accordingly, the term "Treasury" was substituted for the term "Commerce" in 19 U.S.C. 1581(b).

A. Suspicionless boardings and inspections of vessels have been statutorily authorized from the beginning of the Republic

The authority exercised by the Customs officer in this case—the power to board a vessel on inland waters to check its documentation—dates back to statutes enacted in the earliest years of the Republic, including the first customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29. That statute was enacted some two months before the same Congress proposed the Bill of Rights to the state legislatures. As this Court noted in *United States* v. *Ramsey*, 431 U.S. 606, 616-617 (1977):

> The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest. This Court so concluded almost a century ago. In *Boyd* v. *United States*, 116 U.S. 616, 623 (1886), this Court observed:
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> > "* * * *As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment.*" (Emphasis supplied.)

The same is true of the search and seizure involved in the present case.

1. *Since the First Congress, Customs officers have had plenary power to board vessels to enforce the customs laws*

The first customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29, created customs districts and established collection procedures to protect the fledgling Nation's revenue. Section 5 of the Act, 1 Stat. 37, provided:

> It shall be the duty of the surveyor * * * to go on board ships or vessels arriving within his district, or to put on board one or more inspectors * * * to

> examine whether the goods imported are conformable to the entries thereof * * *.

The Act also required masters of ships to deliver their manifests to "any officer * * * who shall first come on board his ship or vessel" (Section 10, 1 Stat. 38) and to report to and deliver documents to Customs officers when their vessels arrived in any port or district of the United States *"or in any of the creeks or harbours thereof"* (Section 11, 1 Stat. 38) (emphasis added). Accordingly, this statute obviously contemplated that Customs officers would be boarding vessels in inland waters and that such boardings were proper irrespective of cause. Indeed, in marked contrast to the provisions noted above, which authorized document check boardings without adverting to any requirement of reasonable suspicion of illegal activity or probable cause, another provision of the same Act expressly required probable cause and a warrant before Customs officers could search on land for dutiable goods (Section 24, 1 Stat. 43). See *United States* v. *Ramsey*, *supra*, 431 U.S. at 616 & n.12.

Although the first customs statute appears to have been directed specifically at enforcement of the customs laws with respect to vessels arriving from foreign ports, Customs' authority was very soon expanded to reach other vessels as well. The Act of Sept. 1, 1789, ch. 11, 1 Stat. 55, established a system of documentation for American vessels and regulated their movement between domestic ports. Section 22 of the Act, 1 Stat. 60-61, required American vessels in excess of 20 tons to be enrolled and licensed and vessels over five tons to be licensed by the collector of Customs. In addition, the Act directed owners of domestic vessels to paint the name and home port of the ship on its stern.

Within a short time, Congress enacted the first direct predecessor of 19 U.S.C. 1581(a). Section 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 164, authorized Customs officers and officers of revenue cutters to board all ships or vessels "in any part of the United States, or within four leagues [12 miles] of the coast thereof, if bound to

the United States, whether in or out of their respective districts, for the purposes of demanding the manifests * * * and of examining and searching" the vessels. Authority to board under this statute was not conditioned upon any suspicion of criminal activity or a border crossing.[8] Since inland waters are "part of the United States," it is clear that this enactment would have authorized the boarding at issue in the present case.

The understanding of the First Congress—that suspicionless Customs' boardings were "reasonable" and thus permitted by the Fourth Amendment—continued as similar statutory predecessors of 19 U.S.C. 1581 were enacted. Section 54 of the Act of Mar. 2, 1799, ch. 22, 1 Stat. 668, authorized "all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters * * * to go on board of ships or vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests * * *, and of examining and searching the said ships or vessels * * *." Again, neither probable cause, reasonable suspicion, nor a warrant was required before such searches and seizures took place. And because many of the nation's leading eighteenth century ports, such as Philadelphia, Alexandria, and Baltimore, were located many miles inland, Congress must have contemplated that Customs would be empowered to board vessels on inland waters.

That Congress did not intend to require reasonable suspicion or probable cause for Customs boardings was made particularly clear by an 1815 statute (Act of Mar. 3, 1815, ch. 94, 3 Stat. 231). While granting Customs officers plenary power to board any ship, vessel, boat, or raft, Section 1 of the Act, 3 Stat. 232, also provided that

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[8] The same statute provided for not more than 10 revenue cutters to patrol United States waters (Section 62, 1 Stat. 175). Customs collectors were authorized to use small, open row or sail boats "in going on board of ships and vessels * * * for the better detection of frauds" (Section 65, 1 Stat. 175).

goods found on board could not be seized without "probable cause to believe" that they were "subject to duty, the payment of which is intended to be evaded" or had been illegally imported. Similarly, Section 2 of the Act, 3 Stat. 232, required a suspicion of violation of the revenue laws before stopping and searching carriages, vehicles, persons travelling on foot, or beasts of burden.[9]

In 1866, Congress reaffirmed the authority of Customs officers "to go on board *any* vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end, to hail and stop such vessel if under way * * *" (Act of July 18, 1866, ch. 201, Section 2, 14 Stat. 178; emphasis supplied). When this legislation was in the House, an attempt was made to restrict the Customs' authority to board vessels to instances in which Customs officers had reasonable suspicion that a vessel contained dutiable or illegally imported goods, but the proposal was resoundingly defeated. Cong. Globe, 39th Cong., 1st Sess. 3440-3443 (1866).

The relevant provisions of both the 1799 and the 1866 Acts, which became Rev. Stat. 3067 and 3059 respectively, stood until they were superseded by Section 581 of the Tariff Act of 1922, ch. 356, 42 Stat. 979. Section 581 was virtually identical in all material respects to the present day 19 U.S.C. 1581:

> The primary purpose of that paragraph was not to provide for the seizure of American vessels of known or suspected guilt. It was to facilitate, by means of boarding and examination of the manifest before arrival in port, both the entry of admittedly innocent vessels and the collection of revenues. This end was furthered by enabling customs officers to board and search any vessel, foreign or domestic, within the stated limits, without the necessity of establishing probable cause.

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[9] That same provision required a search warrant for a search of a "dwelling house, store, or other building."

Maul v. *United States*, 274 U.S. 501, 529-530 (1927) (Brandeis and Holmes, JJ., concurring). This same boarding authority was continued by Section 581 of the Tariff Act of 1930, ch. 497, 46 Stat. 747, as amended, and now appears in 19 U.S.C. 1581(a).

Thus, since the very first customs statutes, Congress has continued to afford Customs officers the power to board a vessel, without suspicion of a violation of law, and wherever situated within United States waters, to determine whether the vessel was carrying goods from abroad and was therefore subject to the customs law.

2. The federal vessel documentation laws have also long required vessels to submit to suspicionless documentation inspections

Customs' authority to board vessels for the purpose of conducting document checks naturally went hand in hand with federal licensing and regulation of vessels. As noted above, the Act of Sept. 1, 1789, established a system of documentation for all sizeable American vessels and regulated their movement in domestic trade and fishing activities.[10] Shortly thereafter, in the Act of Feb. 18, 1793, ch. 8, 1 Stat. 305, Congress revised and expanded this system. In fact, the framework that Congress developed in that Act continues to this day. The Act provided for the enrollment and licensing of vessels measuring more than 20 tons and the licensing of vessels measuring between five and 20 tons. The Act also detailed the forms for such documentation (Sections 2 and 4, 1 Stat. 305-307) and prohibited vessels from engaging in any trade for which they were not licensed or from being employed in any trade "whereby the revenue of the United States may be defrauded" (Section 4, 1 Stat. 307). In addition, this statute, like the 1789 Act, required that the name and hailing port of a documented vessel be displayed on the ship's stern (Section 11, 1 Stat. 309).

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[10] See also Section 24 of the Act of Dec. 31, 1792, ch. 1, 1 Stat. 297, which required that masters produce their vessels' registry documents to Customs collectors.

The 1793 Act also established reporting requirements for vessels engaged in domestic commercial trade. Sections 14-18 and 20-22, 1 Stat. 309-314, directed masters to deliver their manifests to Customs officers at the origin and destination of their journeys. Similarly, masters had to surrender their documentation to the Customs officer of their home port before they departed for a foreign voyage (Section 8, 1 Stat. 308). To insure compliance with these measures, the Act empowered Customs officers *"at all times* * * * to inspect the enrollment or license of *any* ship or vessel" (Section 13, 1 Stat. 309; emphasis supplied), and to board any vessel "to inspect, search and examine" it for any breach of United States laws (Section 27, 1 Stat. 315). The former provision later became Rev. Stat. 4336 and is now 46 U.S.C. 277, while the latter section is encompassed within 19 U.S.C. 1581(a). The Act of Mar. 2, 1799, ch. 22, 1 Stat. 627, reenacted the reporting and documentation requirements, and they have remained in force, as modified, ever since.

What the early documentation laws meant in practice is illustrated by the following Treasury Department instructions to Customs officers issued in 1793 (*Treasury Circulars 1793-1828* at 19-20):

> It is evident, that most of the regulations established in relation to the coasting trade and fisheries, will be rendered nugatory unless a vigilant inspection is observed; that this was intended by the legislature appears from the 13th and 27th sections of the law [Act of Feb. 18, 1793, ch. 8, 1 Stat. 305].
>
> * * * * *
>
> Except in the case of constant traders, whose papers are known to be regular, it will be proper to inspect the enrollments and licenses of coasting vessels. If either should appear to be forged or altered, or if the master should be of a different name from the one mentioned in, or endorsed on the license or enrollment, or if the name of the vessel as inserted in the enrollment or license be different

> from that painted on her stern, or if no name be so painted, or if the license be expired, or the employment of the vessel be different from that for which she is licensed, a report ought to be immediately made to the collector or surveyor.
>
> * * * * *
>
> It is conceived, that a satisfactory examination in respect to most of the objects before mentioned may be made, in many cases, by the inspectors who are employed in the revenue boats: so far as this is practicable, it is recommended.

Later statutes extended Customs' regulation to other vessels, including yachts (*i.e.*, noncommercial vessels) of more than 20—and later more than five—net tons (Section 2 of Act of Aug. 7, 1848, ch. 141, 9 Stat. 274). Yachts too had to display their enrollment documents or licenses on demand (Section 1 of Act of Mar. 3, 1883, ch. 133, 22 Stat. 566). In addition, yachts were prohibited from engaging in any trade and from violating any revenue laws (Section 4 of Act of Jan. 16, 1885, ch. 24, 28 Stat. 625; Treas. Reg., Arts. 190 and 192 (1857) (Revenue and Collection Laws)). As a result, the Second Circuit later recognized that the power to board and inspect a vessel's license applied to any vessel, whether foreign or domestic, including pleasure craft and those that have never left United States waters. *The Atlantic*, 68 F.2d 8, 9-10 (1933). See also *United States* v. *Wischerth*, 68 F.2d 161, 161-162 (1933).[11]

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[11] Although motorboats are not documented vessels, they have also been subject to federal regulation since the Act of June 9, 1910, ch. 268, 36 Stat. 462, Section 8 of which included Customs' power to board such boats. Eight years later, motorboats more than 16 feet in length were required to display numbers issued by Customs (Section 2 of Act of June 7, 1918, ch. 93, 40 Stat. 602). The Anti-Smuggling Act of 1935, ch. 438, 49 Stat. 517, required that a motorboat's certificate of its number be kept on board and specified that such a certificate would serve as a document for the boat in lieu of enrollment or license (Section 210, 49 Stat. 526). See also the Motorboat Act of 1940, ch. 155, 54 Stat. 163 (Section

In sum, since before the adoption of the Fourth Amendment and up to the present day, Congress has closely regulated the documentation of American vessels and other vessels in or near the Nation's waters. To ensure the enforcement of those regulations, Congress has consistently authorized Customs officers, without any suspicion of illegal activity or a border crossing, to board vessels on inland waters or within 12 miles of the shore to check their documentation. This history clearly indicates that the First Congress, which proposed the adoption of the Fourth Amendment, and all succeeding Congresses have believed such suspicionless boardings to be reasonable within the meaning of the Fourth Amendment.

B. The public interest served by suspicionless boardings for document inspection purposes fully justifies any invasion of personal privacy thereby entailed

The Fourth Amendment proscribes "unreasonable searches and seizures." This Court has determined the reasonableness of searches and seizures "by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967). See also *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

21, 54 Stat. 167). Similarly, the Federal Boating Act of 1958, Pub. L. No. 85-911, 72 Stat. 1754, prescribed that every undocumented vessel containing more than a 10 horsepower motor carry a state-issued number and have the certificate on board available for inspection (Section 3, 72 Stat. 1754-1755). This practice was continued in the Federal Boat Safety Act of 1971, 46 U.S.C. 1451 *et seq.*, which extended the numbering requirement to any undocumented vessel equipped with an engine (46 U.S.C. 1466). The Act likewise provides that a vessel's numbers be displayed on it and that the certificate of number always be available for inspection on the vessel (46 U.S.C. 1469(a) and 1470). The state numbering system for motorboats now is supervised by the Coast Guard. See 33 C.F.R. 173.15, 173.21, 173.23 and 173.25 (1981).

We submit that the public interest served by suspicionless Customs boardings far outweighs their effect upon privacy interests protected by the Fourth Amendment. Rather than balancing the particular competing interest involved in such boardings, however, the court of appeals simply relied (see Pet. App. 7a, 15a) upon cases concerning investigatory stops of land vehicles. But as the same court had previously noted in a related context (*United States* v. *Ingham*, 502 F.2d 1287, 1290 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975)):

> [T]here is by act of God, nature, the Congress, and the activities of man a great difference between the landlocked vehicle and the nautical vessel * * *. Congress has long recognized this and the law has to—and does—reckon with these differences often very specifically.

See also *United States* v. *Freeman*, 579 F.2d 942, 946 (5th Cir. 1978). When facile analogies to stops of land vehicles are put aside and the substantial need for Customs officers to board vessels without suspicion in order to conduct document checks is balanced against the minimal effect of such boardings upon personal privacy, it is apparent that such boardings are reasonable within the meaning of the Fourth Amendment.

1. ***Suspicionless boardings and inspections are essential to the enforcement of the documentation laws, which implement important national purposes***

In order to demonstrate Customs' need to board vessels on inland waters and check their documents without having a suspicion of a violation of law,[12] we will first

[12] Although we do not agree with the court of appeals' determination that the boarding officers lacked reasonable suspicion of a law violation prior to boarding the vessel, we did not seek review of that holding. But the holding underscores the problems that the Customs Service will face if the decision below is sustained. The court's treatment of the reasonable suspicion issue (Pet. App. 12a-16a)—examining each element of information in isolation with-

describe the basic documentation that vessels are required by law to obtain and carry. We will then explain the importance of documentation laws and why they cannot be enforced effectively unless Customs officers are permitted to board vessels and examine their documents without having a reasonable suspicion of illegal activity or a border crossing.

a. "Documentation is the administrative procedure by which a vessel is registered or licensed as a vessel of the United States for identification purposes and certified as authorized to engage in a specific trade." H.R. Rep. No. 96-428, 96th Cong., 1st Sess. 2 (1979). A vessel must be "documented" (see 46 U.S.C. (Supp. IV) 65(1)) in order to engage in many maritime activities, such as the coastwise trade (Section 65i), the fishing trade (Section 65k), trade on the Great Lakes (Section 65j), salvage or towing (Section 316), and dredging (Section 292) in territorial waters. In addition, unless an American vessel is documented, it may not be issued a "registry," which entitles the vessel to engage in foreign trade (see 46 U.S.C. (Supp. IV) 65h).

Under the simplified Vessel Documentation Act of 1980, Pub. L. No. 96-594, 94 Stat. 3453, 46 U.S.C. (Supp. IV) 65 *et seq.*, every documented vessel is issued a "certificate of documentation," which lists the vessel's name, home port, and description, as well as the identity of its owner and any additional information prescribed by regulation (Section 65e). Each documented vessel is also issued an identification number (Section 65f), which must be "marked by any permanent method which cannot be obliterated or obscured" on a "clearly visible interior structural part of the hull" (47 Fed. Reg. 27499 (1982) (to be codified at 46 C.F.R. 67.15-1)), usually the vessel's main beam. The vessel's name and hailing port must also be marked in a prescribed place and manner on the vessel's

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out regard to its connection with other information or the officers' experience—is contrary to the approach mandated by *United States* v. *Cortez*, 449 U.S. 411 (1981).

exterior (47 Fed. Reg. 27499 (1982) (to be codified at 46 C.F.R. 67.15-3)).[13]

In addition to a "certificate of documentation," vessels engaged in certain trades, such as the coastwise or fishing trades, must obtain special licenses (see 46 U.S.C. (Supp. IV) 65i, 65j, 65k). If a vessel is employed in a trade for which it is not licensed, it is liable to forfeiture under 46 U.S.C. (Supp. IV) 65m(c).

Only vessels of at least five tons[14] are eligible for federal documentation, and pleasure vessels, although eligible, need not be documented (46 U.S.C. (Supp. IV) 65b, 65*l*). However, any undocumented vessel equipped with propulsion machinery must have a state-issued number, which must be displayed on the exterior of the vessel, as well as a "certificate of number," which must be available for inspection on the vessel at all times (46 U.S.C. 1466, 1469(a) and 1470).[15]

Any foreign vessel that enters a customs district and any American vessel that arrives in the United States from a foreign port or place must also have a "manifest" containing, among other things, a list of all the passengers; a "detailed account of all merchandise on board"; the names of all ports and places where merchandise was taken on board and its destination; the name, hailing

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[13] Evidence of marking must be submitted when the vessel is initially documented, when the name, hailing port, or number is changed, and when a vessel licensed only for pleasure obtains another license (47 Fed. Reg. 27499 (1982) (to be codified at 46 C.F.R. 67.15-5)).

[14] Tonnage refers to the vessel's cubic foot capacity. In this context, a ton equals 100 cubic feet. See 46 U.S.C. 77. A sailboat as small as 27 feet in length and a motorboat as small as 30 feet in length may have the tonnage needed for federal documentation. The *Henry Morgan II* was 12.35 meters, or more than 40 feet, long (June 2, 1980 Tr. 126).

[15] We are informed by Customs that there are now more than 80,000 documented commercial vessels, 67,000 documented pleasure vessels, and 8.5 million numbered boats.

port, and description of the vessel; and the name of the master (19 U.S.C. 1431). After arrival and upon making formal "entry" into this country, the masters of all such vessels must deliver copies of their manifests to Customs (19 U.S.C. 1434, 1435, 1439). Severe penalties, including possible forfeiture of the vessel and its cargo, are prescribed for failing to report the arrival of such a vessel or for failing to file an accurate manifest (see 19 U.S.C. 1460, 1584). Once the manifest is received by Customs, it is employed to monitor the entry of persons and goods into this country (see 19 U.S.C. 1448 (no merchandise, passengers, or baggage may be unladen without permit issued after entry); 19 U.S.C. 1453, 1454 (penalties for noncompliance)).

Similarly, before departing, the master of a vessel bound for a foreign port must deliver the manifest to Customs and obtain clearance (46 U.S.C. 91). Clearance serves several purposes. It furnishes a record of export cargo for statistical purposes (see 13 U.S.C. 303), permits the control of exports (see, *e.g.*, 50 U.S.C. (& Supp. IV) App. 2401-2420; 19 C.F.R. 4.73) and ensures that departing vessels have proper documentation (46 U.S.C. 278; 19 C.F.R. 4.64), have paid all fees (46 U.S.C. 100), are safe, and will not endanger other vessels, persons, property, or the marine environment (19 C.F.R. 4.66).[16]

If a foreign commercial vessel visits more than one customs district, it must obtain a "permit to proceed" after initially making entry and must make entry separately in each district visited (19 U.S.C. 1435). Foreign yachts are subject to the same requirement unless they have been issued a "cruising license" (19 U.S.C. 1435; 46 U.S.C. 104; 19 C.F.R. 4.94(b)). Any vessel carrying cargo or passengers from abroad must also obtain a "permit to proceed" for carriage beyond the port

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[16] Vessels engaged in foreign trade and certain others must also maintain a log book listing certain significant events occurring during a voyage (46 U.S.C. 201).

where entry is initially made (46 U.S.C. 313; 19 C.F.R. 4.85).[17]

Finally, many vessels, including all steam vessels (46 U.S.C. 391(a) and (b)), all passenger-carrying vessels (46 U.S.C. 390a), and large seagoing vessels with internal combustion engines (46 U.S.C. 367), must be inspected periodically by the Coast Guard to determine whether they are suitable for their intended service. See 46 U.S.C. (& Supp. IV) 361-445. If the vessel passes inspection, a "certificate of inspection" is issued and must be displayed or kept on the vessel (46 U.S.C. 399, 400). If inspection is required, a valid certificate is a prerequisite to the issuance of a license or register. Among other things, such certificates must specify the minimum number of officers and crew required for operation (46 U.S.C. 222, 223) and the maximum number of passengers permitted (46 U.S.C. 451).[18]

b. These documentation laws serve many vital functions. They provide the only reliable method of identifying vessels, their owners, and their masters and are consequently essential to the enforcement of all laws applicable to vessels. Without the documentation laws, it would be much more difficult to levy the appropriate penalties upon those responsible if a vessel is observed violating the law—*e.g.*, smuggling aliens or illegal drugs, polluting the water, committing serious safety violations, or evading import duties.

Documentation laws are also needed to ensure that vessels obtain the licenses required for certain trades.

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[17] The "permit to proceed" helps to ensure that all merchandise on a vessel required to make entry, including merchandise not unladen where entry is initially made, is subject to Customs inspection. Together with the manifest, the permit to proceed also helps to enforce the law prohibiting foreign vessels from engaging in domestic trade (46 U.S.C. (Supp. IV) 65i(b)(1)).

[18] Even those vessels not subject to federal inspection and certification, including any vessel equipped with propulsion machinery of any type, may be required to have a valid state-issued safety certificate (46 U.S.C. 1466, 1471).

Congress has carefully restricted entry into many maritime trades in order to preserve natural resources,[19] protect American labor and industry, promote the national defense, and serve other important national purposes.[20]

In addition, the documentation laws play a vital role in the collection of customs duties on imported merchandise (see 19 U.S.C. 1202) and tonnage duties imposed

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[19] For example, only United States vessels documented for fishing and undocumented vessels under five net tons owned by American citizens or resident aliens may engage in commercial fishing within territorial waters (46 U.S.C. (Supp. IV) 65k; 16 U.S.C. 1821 and 1824). With a few exceptions, only such vessels and foreign-flag vessels operating under a permit issued by the National Oceanic and Atmospheric Administration may engage in fishing within the United States Fishery Conservation Zone (from three to 200 miles off shore) (see 16 U.S.C. 1821, 1824).

[20] Only vessels owned by United States citizens, businesses under their control, the federal government, or the states are eligible for documentation (46 U.S.C. (Supp. IV) 65b), which is, as noted above, a prerequisite for engaging in many maritime trades. See also 46 U.S.C. 325 (licensed vessel must remain under ownership and command of U.S. citizen). In addition, vessels not built in the United States, although eligible for documentation, generally may not obtain licenses to engage in the coastwise trade, fishing, or trade and fishing on the Great Lakes (46 U.S.C. (Supp. IV) 65i(a)(2), 65j(a)(2) and 65k(a)(2)). In most instances, moreover, a duty of 50% is levied against repairs performed or equipment purchased in a foreign country (19 U.S.C. (Supp. IV) 1466).

On United States vessels, the officers and pilots, and 75% of the crew must be citizens of this country (46 U.S.C. 221, 672a(a), (b) and 1132(a), (b)). Alien crew members must be in possession of a valid declaration of intention to become a citizen or other evidence of admission for permanent residence (46 U.S.C. 1132(c)).

That these and like laws protect American labor and industry is obvious. They also promote the national defense by limiting the number of foreign vessels in United States waters, restricting the waters they may enter (see 19 C.F.R. 4.67), and helping to ensure that the merchant fleet can be used to further the national defense in time of emergency (see, *e.g.*, 46 U.S.C. 1242 (requisition or purchase of vessels in emergency); 50 U.S.C. 191 (regulation of anchorage and movement of vessels in emergency)).

upon vessels engaged in foreign trade (see 46 U.S.C. 121-135), as well as in preventing the entry into this country of prohibited persons and things, including illegal aliens, controlled substances, prohibited medicines, adulterated foods, dangerous chemicals, prohibited agricultural products, diseased or prohibited animals, and illegal weapons and explosives. Without the documentation laws, customs officers would be greatly burdened in discharging the task of determining the identities of all persons and goods arriving in this country by water.

The laws requiring that certain vessels carry a certificate of inspection play an obvious and important role in ensuring safe shipping and thereby protect persons and cargo in the vessel subject to inspection, as well as those in other vessels, the marine environment, and persons and property on shore. (See, *e.g.*, 46 U.S.C. (Supp. IV) 391a (inspection of vessels carrying oil and hazardous materials); 46 C.F.R. 38.01-5 (inspection of vessels carrying liquified flammable gases); 46 C.F.R. 79.10-1 (inspection of nuclear vessels).)

c. It is essential that Customs Officers[21] be permitted to board a vessel without suspicion of a law violation for

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[21] Customs' authority to enforce the documentation laws is clear even though in recent years the responsibility for issuing the basic vessel documents—the certificate of documentation, register, and licenses—has been assumed by the "secretary of the department in which the Coast Guard is operating" (see 46 U.S.C. (Supp. IV) 65(3)), currently the Department of Transportation (14 U.S.C. 1).

From 1790, when the first federal documentation law was enacted, until 1966, Customs officers were responsible for issuing the basic marine documents. In 1966, that responsibility was transferred to the Coast Guard as part of the new Department of Transportation (Pub. L. No. 89-670, 80 Stat. 931). However, Customs retained the responsibility for issuing certain marine documents, such as "cruising licenses" (46 U.S.C. 104; 19 C.F.R. 4.94) and licenses for vessels under 50 net tons carrying foreign merchandise (19 U.S.C. 1706; 19 C.F.R. 4.100). Furthermore, this transfer of responsibility was not intended to affect Customs' authority to enforce

the purpose of checking the vessel's documents because there are no satisfactory alternative means of enforcing the documentation laws.

First, Customs officers clearly cannot determine whether a vessel is complying with the documentation laws merely by observing the vessel's exterior. Not all vessels encountered in inland or customs waters are required to bear a federally-issued identification number. No such number need be exhibited by "undocumented" American vessels, and neither commercial vessels under five tons nor pleasure vessels are required to be documented (46 U.S.C. (Supp. IV) 65b, 65f(a) and 65h-65k). Undocumented American vessels "equipped with propulsion machinery" must bear state-issued identification numbers (46 U.S.C. 1466), but other vessels need not exhibit any number, their name, or their hailing port. In addition, foreign vessels must bear only those markings, if any, required by the laws of their home countries. Vessels, unlike aircraft, are not subject to a uniform international system of identification. Thus, every nation that registers seagoing vessels is free to adopt its own system of identification and marking.

The present case well illustrates that a ship's outward markings are insufficient to determine whether it is in compliance with even the most basic documentation requirements. The Customs officers here encountered a large sailboat whose only markings were the name "*Henry Morgan II*" and the unfamiliar hailing port of

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the documentation laws (see 32 Fed. Reg. 7408 (1967); H.R. Rep. No. 96-428, 96th Cong., 1st Sess. 14-15 (1979)).

Moreover, Customs' longstanding authority to "go on board of any vessel * * * at any place in the United States or within the customs waters * * * and examine the manifest and other documents and papers" (19 U.S.C. 1581(a)) stemmed not only from the Service's responsibility for issuing marine documents but also from its responsibility to collect tariffs, prevent smuggling, and generally regulate the coastwise trade. Thus, Customs officers remain empowered to board "any vessel" (19 U.S.C. 1581(a)), whether documented or undocumented, foreign or domestic.

"Basilea." Based upon this limited information, the officers could not determine whether the boat was (a) a documented American vessel, (b) an undocumented American vessel with an engine but without a state identification number as required by 46 U.S.C. 1470, or (c) a foreign vessel. Only by checking the *Henry Morgan II*'s documents could the officers determine its status and whether it was operating in compliance with the laws and regulations applicable thereto.

On land, a police officer can frequently determine merely by observing a vehicle's license plate and other outward markings whether it is currently in compliance with state registration laws and related state requirements, which, moreover, are generally far less extensive and complex than maritime documentation requirements. In *Delaware* v. *Prouse*, 440 U.S. 648, 660-661 (1979), this Court pointed to the information conveyed by license plates in holding that random stops of vehicles without reasonable suspicion violate the Fourth Amendment. The markings on vessels, however, are not comparable. While license plates are issued by the states and cannot easily be counterfeited, the only required outward markings on documented vessels (the name and hailing port), as well as the numbers displayed on undocumented boats, are painted or marked on the vessel by the owner or at his direction,[22] are not periodically checked, and even if in the proper form, do not show whether the vessel's documentation is still in effect.

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[22] It is not uncommon, particularly when a boat is being employed in illicit activities, that a false name will be painted on it or its true nation of registry disguised. See, *e.g.*, *United States* v. *Marino-Garcia*, Nos. 81-5551, 82-5284 (11th Cir. July 9, 1982) (name altered; asserting false nationality); *United States* v. *Arra*, 630 F.2d 836, 838 (1st Cir. 1980) (hailing port painted over); *United States* v. *Demanett*, *supra*, 629 F.2d at 865 (name and hailing port not permanently affixed, printed on placard); *United States* v. *Monroy*, 614 F.2d 61, 64 (5th Cir.), cert. denied, 449 U.S. 892 (1980) (name freshly painted; two other names used: no flag); *United States* v. *Rubies*, 612 F.2d 397 (9th Cir. 1979), cert. denied, 446 U.S. 940 (1980) (two names used).

License plates borne by land vehicles also generally indicate whether the vehicle is licensed for commercial use. Thus, for example, if a car with ordinary license plates is observed in use as a taxicab, a violation of the registration laws may be reasonably suspected. The markings on a documented United States vessel, by contrast, do not indicate whether it is licensed for pleasure or for a particular trade. As a result, if a vessel designed for recreational use and bearing the markings required for documented vessels is seen engaged in commercial fishing or some other trade, its outward markings will not reveal whether it is operating in compliance with the terms of its license. Similarly, if a large boat originally designed for commercial use fails to exhibit the markings required for documented vessels, Customs officers cannot determine without examining its documents whether it is an American commercial vessel (which must be documented), a pleasure craft (which need not be), or a foreign vessel.

While the information conveyed by a vessel's outward markings is much more limited than that furnished by the license plates and other required outward markings on automobiles, vessel documentation laws are, ironically, far more comprehensive and detailed. For example, neither federal nor state law restricts licensed automobiles to particular geographical areas. On the other hand, a vessel's license may restrict it to a particular trade in a particular area (see 46 U.S.C. (Supp. IV) 65h-65*l*). Perhaps most significantly, the laws regarding ships' manifests have no analog in the field of land transportation. Obviously, a Customs officer cannot determine merely from observing the outside of the vessel whether it is in compliance with even the most basic provisions of the highly important federal statutes concerning manifests. Nor is it possible for Customs officers, who are required to enforce all shipping laws (46 U.S.C. 494, 495), to determine without inspecting a vessel's documents whether it has a valid certificate of inspection.

The fact that Customs' officers are unable to determine whether a vessel is complying with the documentation laws merely by observing its exterior might not be of great significance if compliance with those laws could be policed by means other than the suspicionless boardings long sanctioned by Congress. It is clear, however, that no such alternative means of enforcement exist. Roadblocks, which this Court has suggested as an alternative to random stops on land (see *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663), are plainly impractical in most instances on the inland or customs waters. See *State* v. *Casal*, 410 So.2d 152, 155 (Fla. Sup. Ct. 1982). The cost of maintaining ships at sea for that purpose would be prohibitive, and vessels could easily evade such checkpoints except on the narrowest waterways.

In *Delaware* v. *Prouse*, *supra*, 440 U.S. at 659, this Court concluded that random automobile stops were not needed to enforce vehicle and traffic safety laws because those laws could be enforced by "acting upon observed violations." The Court also suggested (see *id.* at 659-660) that unsafe drivers and vehicles are presumably more likely to become involved in accidents, at which time the driver's license and the vehicle's registration may be examined. As noted, however (see page 28, *supra*), violations of the vessel documentation laws are frequently not detectible without examining the vessel's documents, and violations of many of those laws will not necessarily increase the chances of an accident or any other event that would trigger a documents check. In addition, *Prouse* dealt only with passenger cars and not more heavily regulated vehicles.

The court of appeals suggested (Pet. App. 14a) checking by radio with the Coast Guard documentation office as an alternative to boarding a vessel and examining its documents. However, in many instances, such as this case, Customs officers must patrol in boats that lack the capability of making such radio contact. In addition, the information available from the documentation office is far less extensive than that contained in the vessel's

documents. For example, the contents of the manifest and certificate of inspection, if any, are not available. And the documentation office cannot furnish information on undocumented vessels, such as foreign vessels (like the *Henry Morgan II*) and numbered boats. Finally, the information yielded by such radio checks is only as reliable as the vessel's outward markings, which as previously noted are easily falsified and are not periodically checked by government authorities.

Policemen on land may enforce registration and licensing laws by observing vehicles parked on public streets, since land vehicles do not usually operate for more than a few hours without stopping. Vessels, on the other hand, may operate for weeks or months without putting into port. Some may operate in United States waters for long periods of time without ever putting into a United States port. Others may operate in flagrant violation of the documentation laws while at sea—*e.g.*, by engaging in a trade for which they are not licensed—but may remove all traces of their unlawful activities during their infrequent visits to ports in which Customs inspection may be anticipated. Thus, Customs could not effectively enforce the documentation laws simply by checking vessels in port. And, in any event, the court of appeals' decision would apparently deny Customs even the authority to conduct such checks without reasonable suspicion of a law violation or a border crossing.

d. Finally, stops such as the one that occurred in this case are needed and are distinguished from all investigatory stops on land by their vital role in policing the Nation's borders. "[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States* v. *Ramsey*, *supra*, 431 U.S. at 616. The court of appeals believed that precedent concerning border searches was inapplicable in this case because the Cus-

toms officer did not have " 'articulable facts from which [he could] reasonably infer that the boat ha[d] come from international waters' " (Pet. App. 11a, quoting *United States* v. *Whitmire*, 595 F.2d 1303, 1307 (5th Cir. 1979), cert. denied, 448 U.S. 906 (1980)). But while the analysis of the court of appeals might be valid in determining when a full-scale customs search of persons, baggage, and cargo is justified, all that is claimed here is the far more limited power to board a vessel and inspect its documentation, in part for the purpose of determining whether a customs search is in order. In curbing the government's power to make even this threshhold determination by relatively unintrusive means, the court failed to take sufficiently into account the special characteristics of the Nation's water borders and unjustifiably impaired "the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country" (*United States* v. *Ramsey*, *supra*, 431 U.S. at 616).

Even on land, the need to police the borders may bear upon the reasonableness of a search or seizure where there is no particularized suspicion of a border crossing. Thus, in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the need to stem illegal immigration and smuggling was held to justify stops at a permanent checkpoint located many miles from the border and traversed by thousands of persons who had not recently entered the country. The same flexible approach is even more essential in the nautical context, where the "border" is an imaginary line in the water that may easily be crossed without detection.

Policing the Nation's land borders is not, of course, an easy task, as is attested by the traffic of illegal aliens and contraband across those borders. But even those measures employed on land are largely impractical on the water. On land, checkpoints may be established on roads or bridges at or near the border. Vehicles and pedestrians may be channelled through such checkpoints, and fences may be erected to prevent crossings at unau-

thorized points. All persons and goods that pass through such checkpoints may be subjected to a full-blown border search. At a minimum, such measures are generally effective in preventing large shipments of cargo from crossing the border without Customs inspection.

On the water, it is not possible to erect and maintain border crossing checkpoints and fences three miles out at sea so that all vessels that enter this country by sea can be identified and searched at the border. Indeed, no effort has ever been made to require Customs clearance by everyone who crosses the three-mile limit—*e.g.*, the day fishing boat that ventures more than three miles from shore and then returns. Moreover, once a vessel has crossed the imaginary border, it will ordinarily be indistinguishable by all outward appearances from boats that never left the territorial waters, and it may then put to shore or unload goods or persons at any one of thousands of places either at sea, directly on the coast, or in inland waters. If the border search rationale has no application except at the imaginary border at sea or in those instances in which Customs has concrete evidence that a particular vessel may have crossed the border, then the sovereign's right to police its borders will be seriously abridged.[23]

On the other hand, permitting Customs officers to stop and board a vessel on inland or Customs waters for the

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[23] Even with the most advanced technology, such as aerial or satellite surveillance, the government could not keep track of which vessels have travelled abroad or taken on persons or goods from abroad. There are now more than 8 million documented vessels and numbered boats in the United States (see note 15, *supra*), not to mention the large number of foreign vessels that may customarily be found in our waters. In border areas, even relatively small boats are quite capable of reaching this country from foreign soil, and all along the coasts small boats can easily travel beyond the three-mile limit, make contact with vessels from abroad, and return to shore. And while aircraft must usually land at airports or risk raising suspicion, it is not unusual for boats to put ashore at any of the countless docks, piers, and marinas that dot the coastlines.

limited purpose of checking its documentation is a reasonable method of protecting the border, as well as a reasonable means of enforcing other important laws. By checking a vessel's documents and questioning its occupants, Customs may learn whether a border crossing has taken place, whether a ship coming from a foreign port has made entry since arriving in United States waters, and whether the vessel is proceeding, in accordance with its manifest, toward a Customs port of entry.

2. ***Because of the pervasive regulation and unique nature of maritime activity, suspicionless boardings and inspections do not intrude upon important Fourth Amendment interests***

As we have attempted to show, Customs' plenary authority to board a vessel and check its documents is essential to the enforcement of a broad range of laws of considerable national importance. On the other side of the balance, such boardings do not intrude greatly upon personal privacy interests protected by the Fourth Amendment.

a. First, the searches and seizures resulting from such boardings are very limited in scope. If the vessel is under way and must be stopped, it is usually detained for only a short time. In the present case, the *Henry Morgan II* was anchored when approached by the patrol boat and thus it probably would not have been detained at all if criminal activity had not been discovered. The scope of search is also limited. Once a Customs officer has boarded a vessel for a documents check, he generally remains on the weather decks, where he is able to observe only those portions of the vessel that would be in plain view of any taller vessel nearby or any aircraft flying overhead. If the Customs officer leaves the weather decks, it is generally only for a brief period so that he can inspect the ship's documents in the navigational spaces or examine the vessel's identification number on the interior of the hull. When conducting documents checks, Customs officers do not search the ship's cargo, the compartments of

the officers, crew, or passengers, any other living space on board the vessel, or any personal belongings.

b. Second, the longstanding and pervasive federal regulation of virtually all aspects of maritime activity means that persons on vessels within the jurisdiction of the United States have a greatly diminished legitimate expectation of privacy. This Court has previously considered the impact of close regulation of an industry upon a participant's legitimate expectation of privacy. In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76 (1970), the Court recognized that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." The Court made note (*id.* at 75) of "the long history of the regulation of the liquor industry during pre-Fourth Amendment days." It also observed (*ibid.*; footnotes omitted) that "in 1791, the year in which the Fourth Amendment was ratified, Congress imposed an excise tax on imported distilled spirits and on liquor distilled here, under which law federal officers had broad powers to inspect distilling premises and the premises of the importer without a warrant."

In *United States* v. *Biswell*, 406 U.S. 311 (1972), the Court upheld the warrantless search of a federally-licensed gun dealer's storeroom pursuant to a provision of the Gun Control Act, 18 U.S.C. 923(g), that authorizes federal agents to enter the premises of such a dealer "for the purpose of inspecting or examining (1) any records or documents required to be kept * * * and (2) any firearms or ammunition kept or stored by such * * * dealer * * *." The Court observed that such inspections "pose only limited threats to the dealer's justifiable expectations of privacy" because "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." 406 U.S. at 316.

In *Marshall* v. *Barlows, Inc.*, 436 U.S. 306, 313 (1978), the Court affirmed that when a person chooses to engage

in an enterprise with "a long tradition of close government supervision," his legitimate expectation of privacy may be significantly diminished. The *Barlows* Court, however, refused to extend that exception to every business engaged in interstate commerce.

Most recently, in *Donovan* v. *Dewey*, 452 U.S. 594 (1981), this Court upheld the constitutionality of a provision of the Federal Mine Safety and Health Act authorizing warrantless inspections of mines conducted without reasonable suspicion or probable cause. The Court relied upon Congress' determination that such searches are necessary to further the regulatory scheme (*id.* at 601-602) and the fact that "the regulation of mines [imposed by the Act] is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection' " (*id.* at 603, quoting *United States* v. *Biswell*, *supra*, 406 U.S. at 316).

These precedents concerning closely regulated industries are clearly applicable in the present case. There is "a long tradition of close government supervision" (*Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313) of vessel documentation (see pages 17-20, *supra*), as well as most other aspects of ships and shipping, and Customs' authority to board vessels for document checks antedates the Fourth Amendment (see pages 13-17, *supra*). Thus, close federal regulation of vessel documentation and many other aspects of shipping is at least as old as federal regulation of the liquor industry and far older than federal gun control and mine safety laws (see *Biswell*, *supra*, 406 U.S. at 315; *Donovan* v. *Dewey*, *supra*, 452 U.S. at 606). And whereas the 1791 liquor tax act (Act of Mar. 3, 1791, ch. 15, 1 Stat. 199) noted in *Colonnade*, *supra*, 397 U.S. at 75, touched off the Whiskey Rebellion, there is no indication that contemporary vessel documentation laws or provisions for their enforcement were viewed as significant invasions of personal privacy.

Moreover, "the pervasiveness and regularity of the federal regulation" (*Donovan* v. *Dewey*, *supra*, 452 U.S.

at 606) of maritime activity are beyond dispute. Most aspects of ships and shipping are closely regulated by the federal government. Federal regulation affects vessels from the largest "super tankers" (see, *e.g.*, 46 U.S.C. (Supp. IV) 391a) to the smallest boat equipped with an outboard motor (see 46 U.S.C. 1466). Federal laws regulate, among other things, the design (see, *e.g.*, 46 U.S.C. 369), manufacture (see, *e.g.*, 46 U.S.C. (Supp. IV) 65i(a)(2), 65j(a)(2), 65k(a)(2)), and maintenance (see generally 46 U.S.C. (& Supp. IV) 390-420) of vessels; their documentation (46 U.S.C. (Supp. IV) 65-65w); the qualifications and licensing of officers (46 U.S.C. 224, 224a, 226 and 228-229a); the qualifications of seamen and their terms and conditions of employment and benefits (46 U.S.C. 561-692); the number of officers and crew required (46 U.S.C. 222 and 223) and their duties and hours (46 U.S.C. 229d, 229e, 231, 235 and 244); safety equipment and procedures (see, *e.g.*, 46 U.S.C. 471-489); the trade or activity in which a vessel may engage (see, *e.g.*, 46 U.S.C. (Supp. IV) 65h-65n); the type of cargo it may carry and the method of storage (see, *e.g.*, 46 U.S.C. 170 and 391a); the number of passengers that may be transported (46 U.S.C. 451); the ports that may be visited (19 U.S.C. 1434, 1435 and 1444; 19 C.F.R. 4.67); the places in which repairs may be performed without paying duty (19 U.S.C. (Supp. IV) 1466); and procedures upon arriving from a foreign port or place (19 U.S.C. 1434, 1435, 1439 and 1448-1461).

In order to enforce such statutes, Congress has enacted numerous laws requiring the inspection of vessels by various federal officers. For example, vessels engaged in certain trades must be periodically inspected and certified as suitable by the Coast Guard. See, *e.g.*, 46 U.S.C. 390a (passenger carrying vessels); 46 U.S.C. 395 (barges); 46 U.S.C. 404 (ferryboats and other small craft). Other statutes specifically require periodic inspections of certain portions of vessels. See, *e.g.*, 46 U.S.C. 391 (hulls); 46 U.S.C. 392, 404, 407 and 408 (boilers); 46 U.S.C. 160 (passengers' quarters). Besides conducting the periodic

inspections specified by law, Coast Guard officers may inspect arriving and departing vessels "so often as to enable them to detect any neglect to comply with the requirements of law" (46 U.S.C. 435). Moreover, Coast Guard officers have long had the authority to enforce all United States laws on "the high seas and waters over which the United States has jurisdiction" and "[f]or such purposes * * * may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel * * *" (14 U.S.C. 89(a).[24] The courts of appeals have upheld the authority of the Coast Guard, acting pursuant to this provision, to board vessels subject to the jurisdiction of the United States while on the high seas and, at a minimum, to conduct documentation and safety inspections.[25]

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[24] The origin of 14 U.S.C. 89(a) can be traced to the Act of June 22, 1936, ch. 705, Section 1, 49 Stat. 1820, which was enacted in response to the decision in *Maul* v. *United States*, 274 U.S. 501 (1927). In that case, the majority opinion sustained the Coast Guard's seizure of an American vessel on the high seas based upon a narrow grant of statutory authority. In a concurring opinion in which Justice Holmes joined, Justice Brandeis stated (274 U.S. at 512) that the authority to make such a seizure "exists because it is to be implied as an incident of the police duties of ocean patrol which Congress has imposed upon the Coast Guard." The predecessor of 14 U.S.C. 89(a) was enacted to confer expressly the authority that Justices Brandeis and Holmes had viewed as implicit. The House and Senate reports concerning this legislation expressed the view that the authority conferred already existed. S. Rep. No. 2211, 74th Cong., 2d Sess. 1 (1936); H.R. Rep. No. 2452, 74th Cong., 2d Sess. 1 (1936). See also 80 Cong. Rec. 9165 (1936) (remarks of Sen. Copeland); *id.* at 9166 (explanatory letter from Treasury Department) ("The bill does not enlarge the present authority of the Coast Guard but merely reaffirms the jurisdiction which it has been exercising for many years.")

[25] See, *e.g.*, *United States* v. *Watson*, 678 F.2d 765 (9th Cir. 1982) (reasonable where pursuant to administrative plan); *United States* v. *Green*, 671 F.2d 46 (1st Cir. 1982), cert. denied, No. 81-2086 (June 21, 1982); *United States* v. *Hilton*, 619 F.2d 127

Customs officers, of course, have been granted similarly broad powers over vessels within customs waters (19 U.S.C. 1581(a), (b)) and are specifically required, under penalty of fine and dismissal, to enforce all shipping laws (46 U.S.C. 494, 495). Furthermore, when a foreign vessel arrives in a customs district or when an American vessel arrives from abroad, Customs' officers may board and search the entire vessel and its contents, and they may remain on board while the vessel is "within such district, and if necessary while going from one district to another" (19 U.S.C. 1455).

In addition, federal and state officers charged with enforcing federal fishing laws may board and inspect fishing vessels at any time (16 U.S.C. 1861(b)(1)(B)). See *United States* v. *Wills*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Raub*, 637 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980).

Not only does federal law authorize boardings by federal and state officers, but under certain circumstances private individuals must be permitted to board as well.

(1st Cir. 1980); *United States* v. *Williams*, 617 F.2d 1063, 1075-1078 (5th Cir. 1980) (en banc); *United States* v. *Harper*, 617 F.2d 35 (4th Cir.), cert. denied, 449 U.S. 887 (1980) (reasonable where Coast Guard patrolling sea lanes); *United States* v. *Warren*, 578 F.2d 1058, 1064-1066 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). But see *United States* v. *Streifel*, 665 F.2d 414 (2d Cir. 1981) (dictum that reasonable suspicion required).

The reasoning in these cases is almost equally applicable to the present case. In *Hilton*, for example, the First Circuit explained that such boardings and inspections are reasonable "[b]ecause of the unique circumstances existing on the high seas, the long history of regulatory stops and inspections of ocean-going vessels, the heavy overlay of maritime and international law, the concern of the nation for policing its ocean borders * * *, and the strong interest in regulating the conduct of vessels protected by our flag" (619 F.2d at 132). The court relied (*ibid.*) upon "a unique confluence of the policies behind such traditionally distinct exceptions as the border search doctrine, the administrative inspection of highly regulated industries exception, and the automobile exception."

Vessels navigating in certain waters have long been required by federal or state law to be under the control of a licensed pilot familiar with the local navigation hazards. "In this country, compulsory pilotage laws date back to the time of the Revolution and today, at least 23 states have such laws * * *" (*Jackson* v. *Marine Exploration Co.*, 583 F.2d 1336, 1339 (5th Cir. 1978) (footnote omitted). Federal law also requires specially licensed pilots for navigation on certain inland waters (see 46 U.S.C. 216a). Furthermore, most coastwise seagoing vessels not engaged in foreign trade must when navigating in inland waters be under the control and direction of federally-licensed pilots (46 U.S.C. (Supp. IV) 361; 46 U.S.C. 364). See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158-159 (1978). Thus, under long-established authority, a foreign vessel like the *Henry Morgan II* (which will almost always have a master not locally licensed) could have been required to take on a pilot licensed in this country before operating in inland waters.

This longstanding web of regulatory and inspection laws has greatly diminished the legitimate expectation of privacy of all persons on boats. At the very least, it means that there can be no such expectation with respect to the vessel's documents, which are required by law to be kept and exhibited to proper authorities upon demand (46 U.S.C. (Supp. IV) 65e; 46 U.S.C. 277). Whether a legitimate expectation of privacy exists with respect to other items on a vessel and other portions of the craft need not be addressed in this case.

Indeed, persons on a foreign vessel or on any vessel carrying persons or goods from abroad can have no legitimate expectation whatsoever that they will be free from boarding and inspection, especially after entering inland waters. Such vessels are required to report their arrival to Customs and make formal entry, and they may then be subjected to a thorough border search (19 U.S.C. 1433-1435 and 1455). In addition, Customs officers may remain on board a foreign vessel, like the *Henry Morgan II*, as long as it is in United States waters (46 U.S.C. 1455).

Accordingly, a person on board a foreign vessel or a vessel carrying persons or goods from abroad can hardly claim an invasion of his legitimate expectation of privacy when a Customs officer boards the vessel in inland waters for the purpose of checking its documentation. Whether the boarding officer possesses reasonable suspicion that the vessel is subject to a border search is immaterial, for the legitimate privacy expectations of those on board are precisely the same. Since persons in respondents' situation have no legitimate expectation of freedom from suspicionless boarding and document inspection, such action cannot possibly violate their Fourth Amendment rights. See *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978).

c. Just as Customs' need to conduct suspicionless boardings to check documents distinguishes this case from those involving vehicular stops on land, the invasion of personal privacy occasioned by such nautical stops is significantly less. In holding that "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy" (*Delaware* v. *Prouse*, *supra*, 440 U.S. at 662), this Court observed (*id.* at 662-663):

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.

Ships and boats do not play the same unique and central role in the life of the average person. Except in isolated instances vessels are not "a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities." The vast majority of persons on vessels may be divided into two broad categories: those who engage in the closely regulated maritime trades and those who enjoy boating as a recreational activity. For the former, "consent to regulatory restrictions is presumptively concurrent with participa-

tion in the regulated enterprise" (*Delaware* v. *Prouse*, *supra*, 440 U.S. at 662). For the latter, boating is a leisure-time activity and not, as the automobile often is, a necessity of everyday life.

Moreover, neither automobiles nor other forms of land transportation have historically been subject to the same close regulation and inspection as vessels. As noted (see page 16, *supra*), early statutes distinguished between Customs' plenary authority to board vessels and its authority to search land vehicles, pedestrians, and beasts of burden, which was conditioned upon the existence of some suspicion of a violation of the revenue laws. Since then, the forms of land transportation and the role played by land vehicles in daily life has increased to an extent that could not have been anticipated. Neither the character of vessels nor their role in the life of the average person has undergone a comparable transformation.

Boardings of vessels are also distinguished from vehicular stops because "boaters customarily expect the presence of and rely on aid from coast guard or customs vessels when facing the perils of a maritime environment" *United States* v. *Whitmire*, 595 F.2d 1303, 1313 (5th Cir. 1979), cert. denied, 448 U.S. 906 (1980). Coast Guard and Customs officers must often approach a vessel to determine whether help is required. When they cannot communicate effectively with those on board—because no one is on deck, because of language problems, or for other reasons—boarding without consent may be required. In other circumstances—for example, if a vessel is heading into dangerous waters or bad weather—the officers may have to stop the vessel in order to provide assistance. Thus, "[i]t is quite possible * * * that smugglers form the main class of sailors in whom the approach of [Coast Guard or Customs] officers provokes anxiety" (*ibid.*).

The situation that confronted the officers in this case when they approached the *Henry Morgan II* illustrates this point. The officers saw a possibly foreign sailboat anchored in a ship channel customarily traversed by commercial vessels. The sailboat was rocking violently from

side to side and appeared in danger of capsizing. When the officers asked respondent Hamparian, the only person visible on deck, whether he was all right, he merely shrugged and lifted his hands. Thus, from outward appearances, the *Henry Morgan II* might have been under the command of non-English speaking persons in need of navigational, mechanical, or other assistance. If that were the case, those on board would undoubtedly have welcomed the approach and boarding by the officers.

The same is probably not true of the average motorist. Police officers do not customarily approach moving automobiles or stop them for the purpose of assisting with mechanical problems or giving directions. If a motorist needs aid, he or she will usually have stopped the car and, consequently, no seizure or search will take place if a patrolman pulls up to help.

This Court has found that roadblocks or permanent check-points intrude less seriously upon privacy interests than do random vehicular stops. See *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663; *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 558; *United States* v. *Ortiz*, 422 U.S. 891, 894-895 (1975). However, even if such stops were practicable on the water (as they usually are not), their advantages on land probably would not carry over to the nautical environment. On land, "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion" (*United States* v. *Ortiz*, *supra*, 422 U.S. at 894-895; see also *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 558). To persons on a vessel, however, a "road block type" stop would probably be indistinguishable from a random stop except on the most heavily traversed waterways. See *United States* v. *Watson*, 678 F.2d 765, 769 (9th Cir. 1982).

Finally, it is apparent that the effect upon Fourth Amendment interests in cases such as the present one is not at all comparable to that in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), upon which the court of

appeals relied (Pet. App. 7a). In *Brignoni-Ponce*, this Court held that Border Patrol officers violated the Fourth Amendment when they stopped a vehicle near the border and questioned the occupants concerning their citizenship and immigration status without having a reasonable suspicion that the car contained illegal aliens. The Court observed (422 U.S. at 882-883) that millions of people live in border areas and that most of the vehicles in those areas have no connection with illegal immigration.

By contrast, millions of people do not live on the inland and customs waters. And while only a small percentage of the vehicles within 100 miles of the border carry illegal aliens, most large vessels are required by law to carry documentation that Customs officers are entitled to check, and a substantial portion of vessels in a place like the Calcasieu Channel have crossed the border and are therefore subject to Customs procedures.

C. Suspicionless boardings and inspections on inland waters are no less justified than those performed in customs waters

While the court of appeals held in this case that Customs officers may not board a vessel in inland waters for a document check under 19 U.S.C. 1581(a) in the absence of reasonable suspicion of a violation of law, the same court has reached an opposite conclusion where the vessel was located in customs waters. See *United States* v. *Postal*, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *United States* v. *Freeman*, 579 F.2d 942 (5th Cir. 1978). The court here made no effort to explain the differing results,[26] and we maintain that no valid dis-

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[26] The decision below is based upon nothing more than a misinterpretation of the prior Fifth Circuit decisions.

In *United States* v. *Freeman*, *supra*, the Fifth Circuit carefully analyzed the reasonableness of boardings by Customs officers in customs waters for the purpose of checking a vessel's documents and concluded that reasonable suspicion of a law violation is not required. The court relied upon the historical origin of 19 U.S.C. 1581(a), which authorizes such boardings and inspections (579 F.2d

tinction exists, at least with respect to those inland waters frequently traversed by seagoing vessels and others engaged in international commerce.

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at 946-947); the "substantial distinction between a landlocked vehicle and a nautical vessel for Fourth Amendment purposes" (*id.* at 946); and decisions upholding similar boardings and inspections on the high seas by Coast Guard officers acting pursuant to 14 U.S.C. 89(a) (*id.* at 946). Subsequent Fifth and Eleventh Circuit cases involving boardings and inspections in customs waters have followed *Freeman*. See, *e.g.*, *United States* v. *Alonso*, 673 F.2d 334 (11th Cir. 1982); *United States* v. *Alfrey*, 612 F.2d 180 (5th Cir. 1980); *United States* v. *Postal*, *supra*. Cf. *United States* v. *Whitaker*, 592 F.2d 826 (5th Cir.), cert. denied, 444 U.S. 950 (1979) (vessel initially sighted in customs waters but boarded in inland waters).

In the present case and an earlier decision (*United States* v. *Guillen-Linares*, 643 F.2d 1054 (5th Cir. 1981)), the court made no effort to distinguish the above cases, although the analysis in *Freeman* seems equally applicable to boardings and inspections in inland waters. Instead, the court relied (Pet. App. 8a-11a; 643 F.2d at 1056) upon a line of cases upholding boardings and inspections on inland waters based upon reasonable suspicion of illegality. *United States* v. *D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Serrano*, 607 F.2d 1145 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980); *United States* v. *Castro*, 596 F.2d 674 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Whitmire*, *supra*. Cf. *United States* v. *Demanett*, *supra* (upholding Coast Guard boarding and document inspection of vessel initially sighted in customs waters and boarded on inland waters where there was reasonable suspicion of documentation violation). Because reasonable suspicion was present in all these cases, the courts had no occasion to consider whether reasonable suspicion was constitutionally required. In *Whitmire* and *Castro*, the court carefully declined to reach that question (see 596 F.2d at 676; 595 F.2d at 1315-1316). In *Serrano* (607 F.2d at 1148), the court accurately summarized its prior cases as holding that "Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581(a) on facts which justify a reasonable suspicion of illegal activity." However, in *D'Antignac* (628 F.2d at 433), the court erroneously interpreted *Serrano* to mean that the constitutionality of a boarding on inland waters without probable cause "turns * * * on one of the following two principles: (1) a border search; or (2) a limited investigatory stop based upon a

Many of the nation's leading ports are located on bays or rivers many miles from the coast. These include Philadelphia, Baltimore, Houston, Cleveland, Chicago, Seattle, St. Louis, New Orleans, Mobile, and Tampa. Indeed, virtually all ports are located on sheltered inland waters rather than directly on the coast.

The importance of enforcing the documentation laws on such waters is no less than it is at sea. For example, vessels on such inland waters are just as likely to lack proper documentation, to be engaged in a trade for which they are not licensed, or to be in violation of their licenses or certificates of inspection. If such vessels are unsafe, the consequences of an accident on inland waters may be much more severe than at sea. Similarly, goods and persons may be more easily unladen from vessels already in inland waters than from those still miles at sea. Therefore, examining the documents of such vessels is particularly important if import and tonnage duties are to be collected and if the entry of prohibited persons and goods is to be prevented.

Once a vessel has entered port and is prepared to discharge goods or passengers, Customs' need to verify that the goods and passengers are entitled to entry would seem beyond dispute. However, since the vessel, although anchored, is likely to be in inland waters, Customs' authority to board and examine the vessel's documents without a reasonable suspicion of illegality or a border crossing is cast in doubt by the court of appeals' decision. If the vessel's master did not make entry and deliver the manifest to Customs—and a United States vessel engaged in domestic trade would not be required to do so (see

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reasonable suspicion of law violati[illegible]." This incorrect interpretation was followed in *Guillen-Linares* (643 F.2d at 1056), with Judge Coleman stating (*id.* at 1057) that he concurred only "because the result appears to be mandated by our prior decisions, which a panel has no power to change." The same misinterpretation formed the basis for the decision below in this case (see Pet. App. 8a-11a). See also *Blair* v. *United States*, 665 F.2d 500, 505 (4th Cir. 1981) (similar misinterpretation of same cases).

19 U.S.C. 1434) while smugglers are unlikely to do so—it is not apparent how Customs would determine whether entry was required without either boarding the vessel, entering private property to examine the goods, or stopping and questioning the departing passengers. All of those actions, of course, would constitute searches or seizures. Even if the decision below was not meant to affect Customs' authority to board and examine the documents of vessels in port, Customs has nearly an equally great need to board and examine the documents of vessels, like the *Henry Morgan II*, found anchored near land and those sighted near or approaching places at which goods or persons may be put ashore.

Just as there are no satisfactory alternatives to suspicionless boardings and documentation checks at sea, there are no such alternatives in inland waters. A vessel's outward markings are no more reliable or illuminating on inland waters than they are at sea (see page 29, *supra*), and maintaining permanent checkpoints would be nearly as impractical. Because of the breadth of many of the intracoastal waterways, the number of alternative routes, and the numerous bays and inlets that characterize many such waters, avoiding permanent checkpoints would be relatively easy.

Finally, the legitimate expectation of privacy of those on vessels is no greater in inland waters than in customs waters. For those on vessels proceeding to port to make entry and those on vessels that have just left port after receiving clearance, the opposite is undoubtedly true. In those situations, a boarding and documents check would come shortly before or after the time when a full-blown border search could have been anticipated. Similarly, for those required to take on board a local pilot, any legitimate expectation of privacy would already be diminished.

It is also not possible to argue that there is a greater legitimate expectation of privacy on inland waters because of the types of vessels found there or the activities in which those vessels are engaged. The vessels on many

inland waters, such as those leading to major ports, are much more likely to be engaged in foreign trade than the vessels found in many customs waters.[27]

In sum, both in inland and customs waters, Customs' need to board vessels and inspect their documents without reasonable suspicion far outweighs the effect of such boardings and inspections upon interests protected by the Fourth Amendment.[28]

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[27] Even if the Court concludes that the Fourth Amendment does not permit Customs officers to board all vessels on all inland waters in the absence of reasonable suspicion of illegality or a boarder crossing, we submit that the boarding and inspection in the present case were reasonable.

First, even if Customs may not conduct such boardings and inspections on all inland waters (such as an inland lake), it should certainly be permitted to do so on waters such as the Calcasieu River Ship Channel, which connects a customs port of entry to the sea. For the reasons explained in text, the need to conduct boardings and inspections on such waters is greater and the effect upon personal privacy is probably less than in customs waters.

Second, even if Customs may not board and inspect the documents of all vessels, the officers were entitled to do so in this case because they had a reasonable suspicion that the *Henry Morgan II* was a foreign vessel. Foreign vessels must make entry within 48 hours after arrival in customs waters (19 U.S.C. 1435) and must submit to a thorough border search (19 U.S.C. 1455). As a condition of entry, Customs officers may remain on board while the vessel remains in that Customs district or journeys to another district (19 U.S.C. 1455). The vessel is also subject to reinspection (19 U.S.C. 1467). Most foreign vessels must make entry each time they enter a new Customs district (19 U.S.C. 1435). Even if a foreign vessel is a yacht granted a "cruising license" (and thus required to make entry only once), it must still report to Customs within 24 hours after arriving in each district (46 U.S.C. 104; 19 U.S.C. 1433; 19 C.F.R. 4.94). At that time, the existence of such a license may be verified, and the license, the issuance of which is discretionary, may presumably be cancelled.

Because of the conditions upon which foreign vessels are permitted to enter and remain in United States waters, persons on such vessels do not have a legitimate expectation that Customs officers will not board the vessel and inspect its documents.

[28] Neither the court below nor any other court of appeals has required the issuance of a warrant for the boarding of a vessel

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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and the inspection of its documents whether on the high seas, in customs waters, or in inland waters. "The mobility and numerosity of vessels, and the vastness of the sea, make it impossible to provide for the issuance of administrative warrants, in advance, on a vessel-by-vessel basis. And the alternative, issuance of some kind of open-ended process prior to a cutter's departure on patrol * * * would seem to be largely a formalistic exercise." *United States* v. *Arra*, 630 F.2d 836, 842 (1st Cir. 1980).

APPENDIX

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 1581(a) provides:

> Any officer of the customs may at any time go on board of any vessel or ehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. 1701 et seq.], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. 1581(b) provides:

> Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

46 U.S.C. 277 provides:

> Any officer concerned in the collection of the revenue may at all times inspect the register or enrollment or license of any vessel or any document in lieu thereof; and if the master or other person in charge or command of any such vessel shall not exhibit the same, when required by such officer, unless the vessel is one which by regulation of the Secretary of the Treasury is not required to have its register or enrollment or license or document in lieu thereof on board, such master or person in charge or command shall be liable to a penalty of $100, unless the failure to do so is willful, in which case he shall be liable to a penalty of $1,000 and to a fine of not more than $1,000 or imprisonment for not more than one year, or both.

19 C.F.R. 162.3(a)(1) provides:

> (a) *General authority.* A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:
>
> > (1) Any vessel at any place in the United States or within the Customs waters of the United States.

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Petitioner*,

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ and
ROBERT SORTGESE HAMPARIAN, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the authority granted customs officers by 19 *U.S.C.* § 1581 and 46 *U.S.C.* § 277 to board vessels on inland waters for the purpose of inspecting the vessels' documentation violates the fourth amendment whenever the boarding is made without a reasonable suspicion of violation of law?

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JURISDICTION

Respondents Hamparian and Villamonte-Marquez having been deported, this case is not within the jurisdiction of this Court. As discussed herein, this case has been mooted by respondents' deportation.

STATEMENT OF THE CASE

Prior to trial, respondents Hamparian and Villamonte-Marquez moved to suppress approximately 5,800 pounds of marijuana seized by customs officers following a boarding of respondents' sailboat, the *Henry Morgan II*. At the Motion to Suppress, a customs agent located in Morgan City, Louisiana, testified that on March 5, 1980, he received information from an individual informant that there were two loads of marijuana in the Hackberry, Louisiana area. This marijuana was supposedly loaded on two separate boats crewed by foreigners, but the informant could not give any description of the boats. Although the agent testified that he felt the individual was a reliable informant, he also stated that this individual received the information from "a conversation with some more people." The agent readily testified that on March 5, 1980, he did not even know that the *Henry Morgan II* existed. (Record, vol. 2 at 6, 7, 10.)

The information received by the customs agent in Morgan City, Louisiana, was transmitted to customs officials in the Port Arthur, Texas, area, who then formed a patrol of customs officials and state law enforcement officers to conduct a search of the Calcasieu Ship Channel to locate the two vessels loaded with marijuana.

The patrol was resumed the following morning. At approximately 11:30 a.m. on March 6, 1980, this patrol, consisting of customs officials and officers of the Louisiana State Police, sighted the *Henry Morgan II* in inland waters. (Record, vol. 3 at 174.) At the time of the sighting, the vessel was anchored in the Calcasieu Ship Channel some eighteen miles inland from the Louisiana coastline. (Record, vol. 3 at 175, 176.) No one could be seen on the deck of the vessel, the sails were furled,

and there was no movement of the vessel. (Record, vol. 2 at 45; Record, vol. 3 at 45; Record, vol. 3 at 179, 256.)

The government agents first approached the *Henry Morgan II* because a large wake left by a freighter moving up the ship channel allegedly caused the sailboat to tilt violently. The government agents were supposedly concerned for the safety of the individuals aboard the vessel and sought to inquire as to whether anyone was hurt. (Record, vol. 2 at 48, 80, 100.) As the boat containing the customs agents and state police officers passed near the stern of the *Henry Morgan II*, one of the officers noticed the name of the vessel and the word "Basilea" immediately underneath the name. Officer Loren Wilkins of United States Customs testified that when he saw the word "Basilea," he had a "reasonable suspicion" that this was a foreign port. He was quick to add, however, that he did not know for a fact that this was a foreign port, admitting that he was not familiar with all of the ports in the United States. More significant is the fact that no computer check was made by the officers to determine whether or not Basilea was a United States port, or whether the *Henry Morgan II* was documented under federal law. (Record, vol. 2 at 100, 101; Record, vol. 3 at 180, 181.)

At the time the officers were cruising around the *Henry Morgan II*, Mr. Hamparian came out on the deck. Officer Wilkins testified that he inquired as to whether or not Mr. Hamparian was hurt and that Hamparian responded by shrugging his shoulders and lifting his hands. It was then that Officer Wilkins decided to board the vessel. (Record, vol. 2 at 101, 102.) The decision to board was made despite the admissions of both Officer Wilkins and Officer Danny Dougherty of the Louisiana State Police that Mr. Hamparian did not appear to be hurt in any way. He was not limping nor did he have any visual signs of being severely injured. (Record, vol. 2 at 48, 49; Record, vol. 3 at 181.)

Officer Wilkins boarded the *Henry Morgan II*, asked Mr. Hamparian for the vessel's documentation and was presented a document. (Record, vol. 2 at 104, 50.) State Police Officer

Dougherty, a narcotics investigator, also boarded the vessel shortly after Wilkins stepped aboard. (Record, vol. 2 at 57.) After boarding the vessel, the officers supposedly smelled an odor of burning marijuana which caused them to look toward the hold of the boat. Officer Wilkins testified that he saw some burlap sacks wrapped around bulky objects that looked like bells. A search of the vessel was then conducted and the respondents placed under arrest. (Record, vol. 2 at 58, 110, 111.)

The true nature of the search conducted by the agents was clearly shown by their own testimony. That testimony graphically illustrated that the search was not based on sufficient articulable facts to support an inference that the *Henry Morgan II* was smuggling contraband, but was rather a random and general search during which every vessel located in Calcasieu Ship Channel was subject to being stopped and boarded.

Officer Danny Dougherty of the Louisiana State Police testified:

> In lacking specific information, we were looking for anything we could consider to be out of the ordinary or uncommon to that area. . . .

(Record, vol. 2 at 24.)

> Q I think you stated on direct examination that there was specific information lacking concerning these alleged vessels, right?
>
> A That's correct.
>
> Q So you were not looking for a specific vessel or specific type of vessel, as you have stated on direct examination. You were just looking for anything that might be uncommon or as you thought might be out of the ordinary?
>
> A That's true, sir. . . .

(Record, vol. 2 at 41.) Officer Loren Wilkins testified as follows:

Q Mr. Wilkins, this information from Mr. Harrison that you received was general information, was that right?

A That is correct, Yes, sir.

Q No specific vessel was referred to, certainly not the Henry Morgan, II?

A That is correct. No names, no types of vessels. . . .

(Record, vol. 2 at 94.)

Q And in fact, it was your intention after receiving this information to check all of the docking areas, all of the places that you might find vessels?

A That is correct.

Q At this time you had no information regarding the Henry Morgan, II?.

A That is correct. . . .

(Record, vol. 2 at 95.)

Q Now since you did not have an exact location as to where these alleged vessels might have been, it was your intention, I assume, to patrol the entire area around Cameron and Hackberry, is that correct?

A Yes, sir, that was my intention.

Q And, of course, it was your intention to patrol the entire Calcasieu Channel, if possible, is that right?

A Yes sir. In fact we started at Lake Charles that following morning.

Q How many miles does that channel cover, do you know, how many statute miles?

A No I do not know the exact. I can guess.

Q Okay. If you could?

A Approximately 25, 30, maybe 35 miles. This is just a real rough approximation. . . .

(Record, vol. 3 at 171, 172.)

Q Okay. And so your intention was, or you felt you had to patrol this entire area, is that correct?

A Yes sir. We started at Hackberry where the information was, and then as we progressed we moved out a little further until we hopefully found something.

Q Okay. Now you were checking every dock area, every marina and anything in the area that might contain boats, is that correct?

A We did this too — we are fairly familiar with what boats are there normally. So by checking them, looking into them, we can find out if there is a boat that perhaps is not normally in the area. . . .

(Record, vol. 3 at 172.)

Perhaps the most significant testimony in this regard was given by Officer Jerome Segura of the Louisiana State Police. Officer Segura was not called to testify at the Motion to Suppress, however, he did testify at trial as follows:

Q Was it your intention at that time, and the intention of those aboard your vessel, to approach it in order to determine whether or not someone was hurt on the vessel?

A At that time our first intention was to see if anybody was hurt. We were going to board the vessel had not the ship done anything to it. We would have boarded the vessel anyway.

Q Well, are you saying that a decision was made to board the vessel prior to the time you saw the ship almost capsize?

A The decision was made when we left out of Lake Charles that we were going to board any vessel we found in the ship channel. That vessel was in the ship channel, so therefore, we were going to board it.

Q Okay. So that decision was made prior to the time you all got into the channel, that every vessel in the ship channel would be boarded?

A Right. . . .

(Record, vol. 3 at 239, 240.)

The Motion to Suppress filed by respondents was denied by the district court, and after a jury trial, respondents were each convicted on all counts of the indictments against them. An appeal was then taken to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed, holding that the boarding of *Henry Morgan II* could not be justified as either a valid border search or an investigatory stop based on a reasonable suspicion of a law violation. *United States* v. *Villamonte-Marquez*, 652 F.2d 481 (5th Cir. 1981). Upon remand and dismissal of the indictment by the district court, respondents were forcibly deported by the United States Immigration and Naturalization Service.

SUMMARY OF ARGUMENT

This case does not involve a boarding of a vessel for purposes of conducting a routine administrative inspection. As the facts demonstrate, the *Henry Morgan II* was boarded by the officers of a law enforcement patrol formed for the specific criminal investigatory purpose of locating boats loaded with marijuana. Respondents' sailboat was boarded not only by a customs agent but also by a state police narcotics investigator who had no authority under either 19 *U.S.C.* § 1581(a) or 46 *U.S.C.* § 277 to board the vessel to conduct a vessel documentation check. As the vessel stop and boarding was for the sole or primary purpose of searching for narcotics violations, the officers were required to have at least a reasonable suspicion of some violation of law before conducting such a criminal investigatory stop.

Even assuming the stop and boarding were purely administrative in character, the random mere-suspicion stop and boarding of pleasure boats cannot be squeezed into the mold of a warrantless regulatory inspection. Pleasure boating is not an industry or business, let alone a pervasively regulated one. A fair examination of the historical record does not show that the First Congress considered all warrantless, suspicionless searches and inspections of vessels to be reasonable, and certainly

sheds no light on what they might have thought about searches and inspections of modern-day pleasure craft. In any case, unlike the statutes in those cases where warrantless administrative inspections have been upheld, 19 *U.S.C.* § 1581(a) grants unbridled discretion to customs agents in both the selection of pleasure vessels to be inspected and the conduct of vessel inspections.

Moreover, there are less intrusive, and less discretionary alternatives to random, mere-suspicion boardings of pleasure vessels which would be much more productive in identifying pleasure vessels of foreign registry that have recently arrived in United States waters. Ship-to-shore radio and computer could be utilized to check whether or not a particular vessel has been documented under federal law. Regulations could be adopted which require documented pleasure vessels to carry adequate identification markings on the exterior of their hulls, and which guide customs officials as to when, where and how to conduct vessel document checks. Pleasure vessel owners could be informed upon boarding, either orally or by means of an administrative warrant, as to the purpose of the boarding and the areas of objects subject to search or inspection. Because of the existence of these and other less intrusive or more neutral identification methods, this Court's decision in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), requires that customs officials have at least a reasonable suspicion of either a border crossing or of some violation of law before they may randomly stop and board pleasure vessels without a warrant.

Finally, the instant appeal by the government should be dismissed as moot because the respondents have been deported.

ARGUMENT

POINT I

THE BOARDING OF RESPONDENTS' SAILBOAT BY CUSTOMS AGENTS AND STATE LAW ENFORCEMENT OFFICIALS FOR THE SOLE OR PRIMARY PURPOSE OF SEARCHING FOR NARCOTICS VIOLATIONS CANNOT BE JUSTIFIED AS AN ADMINISTRATIVE SEARCH

In *Michigan* v. *Tyler*, 436 U.S. 499 (1978), this Court held that once firemen conducting an administrative inspection of the burned out remains of a furniture store discover evidence pointing to arson as the cause of the fire and "require further access to gather evidence for a possible prosecution," the firemen must procure a warrant "upon a traditional showing of probable cause applicable to searches for evidence of crime." *Id.* at 512. The Court recognized in *Tyler* that "[c]riminal probable cause is required . . . when an investigation changes from purely administrative to criminal in nature." *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1318 (7th Cir. 1980). *Accord, Blackie's House of Beef, Inc.* v. *Castillo*, 659 F.2d 1211, 1225 (D.C. Cir. 1981); *United States* v. *Lawson*, 502 F. Supp. 158, 165 (D. Md. 1980). Thus, it is illegal to employ an administrative warrant as a device to seize evidence to be used in a criminal prosecution. *In the Matter of Searches & Seizures Conducted on October 2, and 3, 1980*, 665 F.2d 775, 777 (7th Cir. 1981) (Swygert, J., concurring); *Commonwealth* v. *Frodyma*, ___ Mass. ___, 436 N.E.2d 925, 928 (1982). Similarly, customs agents conducting a criminal investigation with the aid of state police officers may not employ a warrantless administrative inspection as a device to get on board vessels suspected of smuggling narcotics into the United States in order to search for and seize narcotics for use in a criminal prosecution. To conduct such a criminal investigatory stop or boarding of a vessel, they must have at least a reasonable suspicion that the vessel is engaged in criminal activity.

As the facts of this case show, the boarding officers did not set out on the morning when the *Henry Morgan II* was boarded to conduct routine administrative inspections of vessel docu-

ments. The night before the boarding, customs agents had received an informant's tip that two vessels crewed by foreigners and loaded with marijuana were supposedly lying in the Hackberry-Cameron, Louisiana, area. The agents immediately formed a patrol of customs agents and Louisiana state officials to conduct a search of the Calcasieu Ship Channel for the specific purpose of locating these vessels. On the morning of the boarding in question, this patrol to locate boats loaded with marijuana resumed with the aid of members of the Louisiana State Police. Thus, far from conducting a routine series of administrative inspections, *compare Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 309-10 (1978) (routine OSHA safety inspection of business premises), or even an otherwise uneventful patrol for general law enforcement purposes, *compare Delaware* v. *Prouse*, 440 U.S. 648, 650-51 (1979) (routine stop of car for license and documentation check by policeman who "wasn't answering any complaints"); *United States* v. *Piner*, 452 F. Supp. 1335, 1337 (N.D. Cal. 1978) (stop and boarding of sailboat by coast guard for safety inspection during routine law enforcement patrol on "slow" night), *aff'd*, 608 F.2d 358 (9th Cir. 1979), the customs agents in the case at bar were engaged in an ongoing criminal investigation of alleged narcotics violations when they approached and boarded the *Henry Morgan II*.

Nor did the criminal nature of the agents' investigation suddenly dissipate as their patrol boat neared the *Henry Morgan II*. State Police Officer Segura testified that the members of the special investigative patrol "were going to board" the respondents' sailboat, even had it not been violently rocked by the wake of a ship, pursuant to a decision made earlier by the officers and agents to board every vessel they found in the ship channel. (Record, vol. 3 at 239, 240). In addition, Customs Officer Wilkins became more intrigued with the sailboat after he received a noncommittal answer to his repeated question as to whether Mr. Hamparian was all right. Wilkins interpreted this response as indicating that Mr. Hamparian could not understand English. According to the informant's tip, the marijuana-laden vessels for which Wilkins and the other mem-

bers of the investigatory patrol had been searching all morning were allegedly manned by persons speaking a foreign language.

More significantly for purposes of characterizing the true nature of the boarding of the *Henry Morgan II*, State Police Officer Dougherty, a narcotics investigator, accompanied Customs Officer Wilkins when Wilkins boarded the boat. Dougherty's presence cannot be explained as a necessary incident to the conduct of a routine administrative document check. *See In the Matter of Searches & Seizures Conducted on October 2, and 3, 1980, supra*, 665 F.2d at 777 (Swygert, J., concurring) (drug enforcement administration agent's use of Milwaukee City Police in conducting administrative inspection search of pharmacy "was, to say the least, highly questionable"). In fact, the boarding authority of 19 *U.S.C.* § 1581(a) (1977) only authorizes "[a]n officer of the customs" to "go on board of any vessel . . . and examine the manifest and other documents and papers . . ." The statute gives no such authority to a state police officer. *See also* 46 *U.S.C.* § 277 (1977) (granting authority to inspect vessel documentation only to "officer[s] concerned in the collection of the revenue.")[1] As the state police-

[1] Louisiana state law does give a state police officer authority in enforcing the state's numbering and safety equipment requirements for recreational boats equipped with propulsion machinery, "to stop and board any vessel for the purpose of . . . requiring appropriate proof of identification therefrom, examining the certificate of numbers issued [by the state], or in the absence of such certificate require appropriate proof of identification of the owner or operator of the vessel. . . ." *La. Rev. Stat.* § 851.14 (1964). This boarding authority is much less sweeping than that afforded customs officers by 19 *U.S.C.* § 1581(a) and 46 *U.S.C.* § 277, and does not permit a full-blown administrative check of a vessel's federal documentation, *e.g.*, customs manifests, trade and fishing licenses. Dougherty would have had no authority to ask Mr. Hamparian whether the *Henry Morgan II* had already reported to customs, or whether it was carrying fish or cargo.

In addition, the Louisiana statute provides that state peace officers boarding to conduct administrative inspections "shall first identify themselves." *L.R.S.* § 851.14 (1964). While Wilkins displayed his badge and identified

man's presence on board the *Henry Morgan II* was neither necessary to conduct a routine documentation check nor authorized by § 1581(a), the boarding of the sailboat by both state and federal officers can only be explained in terms of the patrol's paramount mission to pursue a criminal investigation to locate boats loaded with narcotics.

Even if it could be said that Wilkins honestly intended to come aboard the *Henry Morgan II* solely to conduct a vessel documentation check, the state police officer's boarding of the sailboat on Wilkins' heels exceeded the scope of the initial boarding by the customs officer. *Cf. United States* v. *Hoffman*, 607 F.2d 280, 284 (9th Cir. 1979) (warrantless entry of police officer into burning trailer home to seize sawed-off shotgun, following entry of firefighters to extinguish blaze, exceeded the scope of the initial intrusion by the firemen). State Police Officer Dougherty could not and did not board the boat to aid in checking vessel documentation. His obvious and only authorized purpose in boarding was to check the vessel for narcotics violations. Even assuming that a recreational boater may reasonably expect his vessel to be subjected to a random, suspicionless stop and boarding by a customs agent for purposes of vessel document check, this does not mean he should also expect that any kind of state or federal law enforcement officer may board in the agent's wake to search for contraband or evidence of a crime. 607 F.2d at 285 ("[N]o citizen should reasonably expect that, because a fire has occurred in his home, and certain few officials may enter, any sort of public officer may thereafter invade his home for purposes unrelated to the initial intrusion").

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himself as a customs officer before boarding the boat, Dougherty followed Wilkins on board without so much as an attempt at identifying himself as a state police officer. Thus, Dougherty failed to properly invoke even the limited boarding authority he possessed under Louisiana state law to conduct administrative inspections. Given the fact that Dougherty was a narcotics investigator, his failure to identify himself also demonstrates that his sole purpose in boarding the *Henry Morgan II* was to check for narcotics violations.

As the sole or primary purpose of the boarding was to search for and seize narcotics, the mixed patrol of state police officers and customs agents could not effect even a brief investigatory stop and boarding of the *Henry Morgan II* on inland waters without at least a reasonable suspicion that the sailboat was engaged in criminal activity.[2] *See United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (roving border patrol stop of vehicle near Mexican border to check for illegal aliens); *Terry* v. *Ohio*, 392 U.S. 1, 27 (1969) (stop and frisk of persons suspected of carrying dangerous weapons). The lower federal courts have consistently applied the reasonable suspicion standard in similar fact situations. *Blair* v. *United States*, 665 F.2d 500, 505 (4th Cir. 1981) (boarding of yacht on Potomac River by patrol of customs officers, state marine police and county law enforcement officer); *United States* v. *Ruano*, 647 F.2d 577, 579 and n. 5 (5th Cir. 1981) ("[T]he overwhelming evidence indicates that the customs officers stopped appellant's boat not to inspect its documents but to investigate the suspicious circumstances surrounding the boat's entry into Government Cut"); *United States* v. *D'Antignac*, 628 F.2d 428, 434 (5th Cir. 1980) (dockside boarding of shrimp boat by customs patrol officer accompanied by county deputies), *cert. denied*, 450 U.S. 967 (1981); *cf. United States* v. *Streifel*, 665 F.2d 414, 422-23 (2d Cir. 1981) (investigatory stop by coast guard on high seas). The mere fact that a customs officer requests or inspects the vessel's documentation at some point during the boarding does not change the criminal nature of such an investigatory stop. *See Blair* v. *United States*, *supra*, 665 F.2d at 503 (customs officer requested boat's documentation); *United States* v. *Serrano*, 607 F.2d 1145, 1147, 1148 (5th Cir. 1979) (applying reasonable suspicion standard to boarding of shrimper suspected of smuggling drugs where officer smelled marijuana while questioning crew member whether he was

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[2] The Government does not contest the finding of the Fifth Circuit below that the boarding officers lacked a reasonable suspicion of a law violation prior to stepping abroad the *Henry Morgan II*.

owner or master named in ship's documents), *cert. denied*, 445 U.S. 965 (1980).

If the government's position were to be upheld, customs agents, accompanied by state law enforcement officers, could engage in random, suspicionless stops and boardings of any recreational vessel they wished to check for narcotics violations by the simple expedient of always asking for the vessel's documents upon stepping aboard. In view of the breathtaking sweep of the boarding authority granted to customs agents by 19 *U.S.C.* § 1581(a), mixed patrols of customs agents and state police could stop pleasure craft at random for narcotics checks, day or night, anywhere on the nation's inland waters. The millions of innocent boaters, their families and friends who use the nation's waterways to engage in lawful vacation and recreational activities could be subjected to random, dragnet-type, investigatory stops and boardings. Because the characteristics of drug smuggling operations tend to generate articulable grounds for identifying violators,[3] the legitimate needs of

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[3] In addition to the cases cited by the Fifth Circuit in which a reasonable suspicion was determined to exist for a vessel stop and boarding, *see United States* v. *D'Atignac*, *supra*, 628 F.2d at 434 (erratic movements of shrimping vessel, coastal shrimping out of season, boat on list of suspected smuggling vessels); *United States* v. *Serrano*, *supra*, 607 F.2d at 1149 (traveling at night without navigation lights, exchange of lights with another darkened vessel, shrimper vessel stopped in shallow water near residential area); *United States* v. *Castro*, 596 F.2d 674, 676 (5th Cir. 1979) (running of document check prior to boarding revealed that no vessel named *Tanila* was documented), *cert. denied*, 444 U.S. 963 (1980); *United States* v. *Whitmire*, 595 F.2d 1303, 1316 (5th Cir. 1979) (boat riding heavy in bow, speeding through "no wake" area in violation of navigation laws, unsatisfactory document check ashore), *cert. denied*, 448 U.S. 906 (1980), a reasonable suspicion has similarly been found to exist in numerous other cases. *E.g.*, *United States* v. *Glen-Archilla*, 677 F.2d 809, 813 (11th Cir. 1982) (odor of marijuana detected upon approaching ship); *United States* v. *Green*, 671 F.2d 46, 53-54 (1st Cir. 1982) (boat on list of suspected smuggling vessels; riding low in water, sluggish, and heavy in bow; boat did not respond until after two hours to Coast Guard's efforts to hail her by radio); *Blair* v. *United States*, *supra*, 665 F.2d at 505 (evidence of smuggling operation underway at nearby land-

law enforcement do not require this degree of inteference with lawful pleasure boating activities. *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 883. A requirement of reasonable suspicion for stops and boardings allows the government and the states adequate means to guard the public interest, while protecting recreational boaters from "indiscriminate official interference." *Id.*

Because the boarding officers in this case were clearly engaged in a criminal investigation to locate boats loaded with marijuana when they stepped onto the deck of the *Henry Morgan II*, they could not employ a warrantless administrative document check as a device to circumvent the requirement of a reasonable suspicion of criminal activity. Just as a fire does not strip a house or store of fourth amendment protections, *Michigan* v. *Tyler*, *supra*, 436 U.S. at 505-06; *United States* v. *Hoffman*, *supra*, 607 F.2d at 283, the existence of documents on board a recreational vessel should not give government officers carte blanche to board the vessel for criminal investigatory purposes.

POINT II

EVEN ASSUMING THE RANDOM BOARDING ON INLAND WATERS OF RESPONDENTS' SAILBOAT BY CUSTOMS AGENTS AND STATE POLICE WAS FOR THE PURPOSE OF CHECKING VESSEL DOCUMENTATION, THIS BOARDING CANNOT BE JUSTIFIED AS A WARRANTLESS, SUSPICIONLESS ADMINISTRATIVE SEARCH OF A PERVASIVELY REGULATED BUSINESS.

In *Delaware* v. *Prouse*, 440 U.S. 648 (1979), this Court refused to expand the warrantless administrative search ex-

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ing, sighting by reliable informant of a sailboat riding low in water, discovery of heavily laden sailboat of similar description); *United States* v. *Zurosky*, 614 F.2d 779, 790 (1st Cir. 1979) (fishing vessel tied up to loading dock shortly before large amount of marijuana discovered in adjacent warehouse; vessel's decks wet despite absence of rain or rough seas, indicating deck had been hosed down to eliminate marijuana residue), *application for stay denied*, 445 U.S. 949 (1980).

ception for pervasively regulated businesses to permit a random, mere-suspicion stop of an automobile for the purpose of inspecting the operator's driver's license and car registration. *Id.* at 662-63. Pleasure boats on inland waters are no more subject to government regulation than automobiles, while boat owners enjoy a far greater expectation of freedom from intrusions on their private recreational and vacation activities than do car drivers in transit. Moreover, unlike the carefully drawn statutes in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *United States* v. *Biswell*, 406 U.S. 311 (1972), 19 *U.S.C.* § 1581(a) grants unbridled discretion to customs agents in the selection of vessels to be inspected and in the conduct of vessel document checks. Consequently, customs agents cannot justify as a warrantless regulatory inspection the random, mere-suspicion boarding of respondents' sailboat, even assuming the boarding was purely administrative in character.

A. Pleasure Boating Is Not A Pervasively Regulated Business But A Sparsely Regulated Recreational Activity Whose Participants Enjoy Greater Expectations Of Privacy Than Do Automobile Drivers And Passengers.

This Court's decisions in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *United States* v. *Biswell*, 406 U.S. 311 (1972), created a narrow exception to the general rule requiring a warrant for administrative inspections of residential and commercial premises. *See Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967). The exception allowed warrantless, regulatory searches of a "prevasively regulated business" where the searches served to further an "urgent federal interest" and were "carefully limited in time, place and scope." *Biswell*, *supra*, 406 U.S. at 315, 316, 317.

Thus, the warrantless administrative search exception has been consistently applied by this Court solely to regulatory inspection schemes of business premises. *Donovan* v. *Dewey*, 452 U.S. 594, 605 (1981) (Federal Mine Safety and Health Act of 1977; underground and surface mines); *United States* v.

Biswell, supra, 406 U.S. at 317 (Gun Control Act of 1968; federally licensed firearms dealers); *Colonnade Catering Corp.* v. *United States, supra*, 397 U.S. at 76 (federally regulated liquor dealers). In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), the government contended that a roving border patrol's warrantless, mere-suspicion stop and search of the petitioner's automobile at a point 25 miles north of the Mexican border, which uncovered a large quantity of marijuana, could be justified as a warrantless, administrative search. The Court, per Justice Stewart, rejected this argument, stating as follows:

> A central difference between those cases [*Colonnade Catering Corp.* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessmen in a regulated industry in effect consents to the restrictions placed upon him.

413 U.S. at 271. *See also id.* at 280-81 (Powell, J., concurring) ("*Colonnade* and *Biswell* cannot fairly be read to cover cases of the present type"). As respondents aboard their sailboat, anchored some 18 miles inland from the coast, were likewise not engaged in any regulated or licensed business, *Colonnade* and *Biswell* are inapposite.

Nor should the warrantless regulatory search exception be extended to pleasure boats on the asserted ground that boat owners enjoy a diminished expectation of privacy due to a long history of pervasive federal regulation of pleasure vessels. The Government points to the customs laws passed by the First Congress in 1789 and 1790, arguing that warrantless document inspections of all vessels were considered "reasonable" at the time the First Congress proposed the adoption of the fourth amendment as part of the Bill of Rights. *See* Resolution of September 29, 1789, 1 Stat. 97. However, a careful examination of these two laws reveals that they provided for the boarding, inspection and search of only merchant vessels

carrying goods imported from aboard.[4] Far from demonstrating that members of the First Congress regarded warrantless, mere-suspicion document inspections to be "resonable" for purposes of the fourth amendment, these early customs laws have been consistently read by the Court as exempting only border searches from fourth amendment constraints. *See United States* v. *Ramsey*, 431 U.S. 606, 616-17, 619 (1977) (so interpreting the 1789 customs statute); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886).

For example, the 1789 statute authorized the customs officer known as the surveyor "to go on board ships or vessels arriving in his district . . . to examine whether the goods imported are conformable to the entries thereof." Act of July 31, 1789, ch. 5, § 5, 1 Stat. 37.[5] The term "entry" referred to the submission of a description of the imported goods by a ship's officer, or the owner or consignee of the goods, at the customshouse, for the purpose of enabling the revenue officers to estimate the duties to be paid on such goods. *See* ch. 5, §§ 11, 13, 1 Stat. 38-40 (1789). Section 5 of the 1789 law therefore contemplated a post-entry border search or inspection of merchant vessels carrying imported goods.

As for the 1790 law, its provisions authorized customs officials to board "ships or vessels in any port of the United States, or within four leagues [*i.e.*, twelve m.] of the coast thereof, *if bound to the United States*," for the purpose of demanding certain manifests and searching the ships or vessels. Act of August 4, 1790, ch. 35, § 31, 1 Stat. 164 (emphasis added). The manifests referred to by § 31 were only required to be carried by ships or vessels laden with imported goods. Ch. 35, § 9, 1

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[4] The first customs law passed in 1789 was entitled "[a]n Act to regulate the Collection of Duties imposed by law on the tonnage of ships or vessels, and *or goods, wares and merchandise imported into the United States.*" Act of July 31, 1789, ch. 5, 1 Stat. 29 (emphasis added). The 1790 customs law was similarly titled. *See* Act of August 4, 1790, ch. 35, 1 Stat. 145.

[5] A provision of the 1790 customs law gave similar boarding authority to surveyors. Act of August 4, 1790, ch. 35, § 6, 1 Stat. 154.

Stat. 155 (1790).[6] Moreover, only masters of ships or vessels laden with imported goods and "bound to any port or place in the United States" were required to produce the manifests for inspection "to such officer or officers of the customs, as shall first come on board his said ship or vessel." Ch. 35, § 11, 1 Stat. 156 (1790). *See also* Act of July 31, 1789, ch. 5, § 10, 1 Stat. 38 (similarly-worded provision). In short, the boardings authorized by § 31 of the 1790 law constituted border searches of merchant ships engaged in international trade and "bound to the United States."[7]

Moreover, in the absence of a finding that a ship or vessel was "bound to the United States" from a foreign port or place, these early laws only permitted customs officers to enter and search a vessel if they had "reason to suspect" that goods subject to duty were concealed therein. Act of August 4, 1790, ch. 35, § 48, 1 Stat. 170 (1790); Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43 (1789). This requirement of at least a reasonable

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[6] Section 9 of the 1790 law provided in pertinent part as follows:

> [N]o goods, wares or merchandise shall be brought into the United States from any foreign port or place, in any ship or vessel . . . unless the master or person having command of such ship or vessel shall have on board a manifest or manifests in writing. . . .

[7] The modern-day successor statutes to the manifest provisions of the 1790 customs law still contain the language "bound to the United States." *See* 19 *U.S.C.* § 1583 (1977) ("The master of every vessel . . . *bound to a port or place in the United States* shall deliver to the officer of the customs or Coast Guard who shall first demand it of him, the original and one copy of the manifest of such vessel . . ." (emphasis added); *id.*, § 1584(a) ("Any master of any vessel . . . *bound to the United States* who does not produce the manifest to the officer demanding the same shall be liable to a penalty . . .") (emphasis added). These statutes have been interpreted by the lower federal courts as only applying to ships or vessels engaged in the importation of foreign merchandise into the United States. *E.g.*, *The Pueblos*, 77 F.2d 618, 619 (2d Cir. 1935) (cause of action to recover penalties under 19 *U.S.C.* § 1584 against motorboats carrying intoxicating liquor could not be sustained because there was no proof of origin or destination of the vessel); *The Helen*, 72 F.2d 772, 773 (3d Cir.) (19 *U.S.C.* § 1584 not applicable to vessel engaged in the coastwise trade), *cert. denied sub nom. United States* v. *Matoil Service & Transport Co.*, 293 U.S. 605 (1934).

suspicion of a customs law violation to justify the boarding and search of a vessel is consistent with the Fifth Circuit's holding below.

Even if the historical record could be read as demonstrating that the First Congress considered warrantless document inspections of vessels to fall outside the protection of the fourth amendment, this would not settle the question of what is a "reasonable" search today. *United States* v. *Streifel*, 665 F.2d 414, 419-20 n. 8 (2d Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1081 (5th Cir. 1980) (*en banc*). In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court held that warrantless electronic surveillance of the petitioner's telephone conversation constituted a "search and seizure" in violation of the fourth amendment, *id.* at 353, despite the lack of historical evidence that the framers of the amendment "desired to outlaw or restrict the use of evidence obtained by eavesdropping." *Id.* at 366 (Black, J., dissenting). In 1789, only a relative handful of pleasure boats were afloat, as compared with the recreational fleet of many millions which now ply the nation's waters.[8]

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[8] The earliest record of an American boat built exclusively for pleasure appears to be a 1717 engraving of a New York harbor showing the *Fancy*, a yacht owned by Colonel Lewis Morris of New York. 29 *Encyclopedia Americana* "Yachts & Yachting" 630 (1975). However, the first American yachts of any distinction appear to have been the *Jefferson* (1801) and the luxurious 83-foot *Cleopatra's Barge* (1816), both built by Captain George Crowninshield, a wealthy Salem, Massachusetts, shipbuilder. Stephens, *American Yachting* 3-6 (1904). In the New York-New Jersey area, John C. Stevens owned a 20-foot sailboat, the *Diver*, as early as 1809, and in 1816, he built a 56-foot pleasure boat called *Trouble*. *Id.* at 11. He also launched the first American catamaran, *Double Trouble* (1820). *Id.*

Today, over eight million recreational craft are numbered under the federal and state numbering systems for undocumented pleasure vessels. U.S. Department of Transportation, Boating Statistics 1981, 10 (May 1982). An estimated 300,000 of these vessels are numbered under Louisiana state law. *Id.* These figures do not include pleasure yachts whose owners have voluntarily obtained federal documentation, or sailboats having no auxiliary propulsion machinery, which are generally exempt from the numbering requirements. *See* 46 *U.S.C.* § 1466 (1977).

Moreover, boarding a vessel may have been the only means available for conducting a registration or document check in the late eighteenth century. Because of the revolution in technology that has since taken place, including the use of computers,[9] "the historical argument pressed by the Government is of little help in ruling on the Fourth Amendment question here." *Streifel, supra*, 665 F.2d at 420 n. 8 (ship-to-ship communication enables the Coast Guard to obtain answers to various questions and ship-to-ship radio often permits speedy verification).

Nor do the early vessel documentation laws cited by the government demonstrate a long history of pervasive regulation of pleasure vessels. These laws only provided for the documentation and regulation of coastal trading vessels and commercial fishing boats. *See* Act of September 1, 1789, ch 11, §§ 22, 23, 1 Stat. 55, 60-61 (requiring the licensing and enrollment [*i.e.*, registration] of ships to be employed in the "coasting trade" or in the "bank or whale fisheries"); Act of February 18, 1793, ch. 8, § 6, 1 Stat. 305, 307-08 (providing that any coastal trading ship or fishing vessel not enrolled and licensed under the act would be subject to the payment of import duties). These laws neither required nor authorized the documentation or regulation of pleasure boats.

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[9] Computers have played a key role in at least one reported case involving a vessel document check. *See United States* v. *Arra*, 630 F.2d 836, 837-38, 845-46 (1st Cir. 1980) (computer run in Miami determined that yacht displaying Florida registration numbers was owned by Grand Cayman Corporation; subsequent boarding by Coast Guard for document check justified to resolve question of yacht's nationality). Moreover, computers are used to help identify vessels which are suspected of drug smuggling. *E.g.*, *United States* v. *Streifel*, 665 F.2d 414, 416-17 (2d Cir. 1981) (El Paso Intelligence Center (EPIC) computer check positively identified vessel as one suspected of drug smuggling); *United States* v. *Demanett*, 629 F.2d 862, 864 (3d Cir. 1980) (EPIC computer check of fishing vessel), *cert. denied*, 450 U.S. 910 (1981). The EPIC is a computerized information center of the United States Drug Enforcement Administration which regularly supplies law enforcement agencies information about vessels suspected of engaging in drug smuggling. *Streifel, supra*, 665 F.2d at 416.

In fact, documentation of pleasure vessels has never been *required* by federal law. In 1848, just three years before the schooner yacht *America* won the first America's Cup race,[10] Congress *authorized* the documentation of "yachts used and employed exclusively as pleasure vessels" to permit these vessels "to proceed from port to port of the United States without entering or clearing at the customshouse." Act of August 7, 1848, ch. 141, 9 Stat. 274. In 1870, four years after the first transatlantic yacht race,[11] Congress amended this documentation authority to further permit documented yachts to proceed "by sea to foreign ports" without clearing at the customshouse. Act of June 29, 1870, ch. 169, 16 Stat. 170-71. Later amendments gradually eliminated the remaining requirement that documented yachts make entry at the customshouse upon their return from a foreign port. Act of August 20, 1912, ch. 307, 37 Stat. 315 (exempting yachts of "fifteen gross tons or under"); Act of September 1, 1954, ch. 1213, Title V, § 501(b), 68 Stat. 1140. Today, both documented and undocumented pleasure vessels are exempt from having to make entry at the customshouse, even upon return from a foreign port, so long as these vessels are "not engaged in trade nor in any way violating the customs or navigation laws of the United States." 19 *U.S.C.* § 1441(3) (1976). *See also* 46 *U.S.C.* § 65*1*(b) (effective July 1, 1982); 46 *C.F.R.* § 67.77-1 (1981).[12]

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[10] Stephens, *American Yachting* 53-68 (1904). Another cardinal event in the history of American yachting, the founding of the New York Yacht Club, took place in 1844, just four years prior to Congress' enactment of the first yacht documentation law. *Id.* at 26-28.

[11] Stephens, *supra* note 10, 89-93. The race started from Sandy Hook, New Jersey, and ended at the Needles on the coast of England. *Id.*

[12] Of course, most pleasure boats of foreign registry, such as respondents' sailboat, are still required to make entry upon arrival in the United States. However, the customs official in the case at bar did not even have a reasonable suspicion that the *Henry Morgan II* was of foreign registry. The agents thought the home port, "Basilea," sounded foreign but did not check to see if, in fact, a home port of that name existed in the United States. United States ports with Spanish, or even Latin names (*e.g.*, Corpus Christi, Texas) are not

The evolution of the federal documentation laws regarding pleasure vessels shows a steady loosening of customs restrictions on those yacht owners who voluntarily have chosen to have their vessels documented under federal law. Instead of pervasive regulation, owners of documented vessels have enjoyed an increasing expectation of freedom from contact with, or interference by, customs officials. In addition, federal documentation has not been involuntarily imposed on pleasure vessels to protect or further some public or national interest, but rather has taken the form of a desirable option held out to pleasure boat owners for their exclusive benefit.[13] While the history of the federal documentation of pleasure vessels may be long, the fact that primarily private, nongovernmental interests have been served by this "regulation" cannot be ignored. *See Donovan* v. *Dewey*, *supra*, 452 U.S. at 606 ("[I]f

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unheard of. The customs officers also suspected that Mr. Hamparian could not speak English, simply because he shrugged his shoulders in response to a question as to whether he was "all right." An indifferent response to a single question, which Mr. Hamparian was not required to answer, cannot form the basis for a reasonable suspicion that he was unable to speak English, let alone that the sailboat was of foreign registry.

[13] This conclusion is strikingly illustrated by the legislative history of the recently enacted Vessel Documentation Act of 1980, Pub. L. No. 96-594, 94 Stat. 3453, 46 *U.S.C.* §§ 65 *et seq.* (effective July 1, 1982), a long overdue streamlining, modernization and simplification of the federal vessel documentation laws. The enactment of this statute was delayed for a number of years because "vehement" opposition arose to a proposed "elimination of the option enjoyed by owners of pleasure vessels of five net tons or more to document their vessels under Federal law in lieu of numbering them under State law." H.R. Rep. No. 428, 96th Cong., 1st Sess. 3 (1979). This opposition came from pleasure boat owners, who pointed out the many benefits they, not the public or the government, received from federal documentation:

> [Federal documentation] provides a yacht significant protection when operating in international and foreign waters; it simplifies customs procedures for entering a U.S. port and facilitates the recovery of stolen boats. Most importantly, however, documentation appears to be the best available method of providing some assurance of clear title. While documentation does not absolutely clear title, it is a method that

the length of regulation were the only criterion, absurd results would occur").

Of course, owners of pleasure vessels are not entirely free from federal regulation. If a pleasure boat with propulsion machinery is not documented under federal law, it generally must be numbered under state law. *See* 46 *U.S.C.* § 1466 (1977).[14] In addition, pleasure vessel operators are subject to

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> the banking community, in the financing of boats, utilizes to assure a certain degree of security.

Id. at 6. *See also* Greeley, *Law for Yachtsmen* 37 (1952) (advantages of federal documentation in purchasing boats).

A compromise was eventually reached by which the option allowing federal documentation of pleasure vessels was retained, *see* 46 *U.S.C.* § 651(a) (effective July 1, 1982), but pleasure boat owners were required to pay for the privilege. *See id.*, § 651(c) (authorizing the prescribing of fees for issuing, renewing, or replacing a pleasure vessel license "based on the costs of the Service provided"). The House Committee report explained the imposition of yacht documentation fees as follows:

> Although no fee is charged for documentation of commercial vessels, the bill authorizes a fee for documentation of pleasure vessels. Since only the larger pleasure vessels may be documented, this is a benefit enjoyed by relatively few vessel owners. The cost of this service should be borne by those who receive the benefits.

H.R. Rep. No. 428, 96th Cong., 1st Sess. 10 (1979). *See also* 47 *Fed. Reg.* 27507 (June 24, 1982) (to be codified at 46 *C.F.R.* § 67.43-11) (revised schedule of yacht documentation fees); 45 *Fed. Reg.* 70262 (October 23, 1980) (original promulgation of yacht documentation fees by Coast Guard) ("The present documentation procedure for yachts primarily benefits yacht owners, not the Government or the public in general").

[14] The numbering requirement for undocumented pleasure vessels propelled in whole or in part by machinery was first imposed in 1918. Act of June 7, 1918, ch. 93, §§ 1-5, 40 Stat. 602, codified at 46 *U.S.C.* § 288 (repealed 1960). This registration requirement was continued in the Federal Boating Act of 1958, Act of September 2, 1958, Pub. L. No. 85-911, § 3, 72 Stat. 1754, codified at 46 *U.S.C.* § 527(a) (repealed 1971) and the Federal Boat Safety Act of 1971, Act of August 10, 1971, Pub. L. No. 92-75, § 17, 85 Stat. 220, codified at 46 *U.S.C.* § 1466 (1977). Thus, the actual regulatory requirement that pleasure vessels be registered does not predate the beginning of this century.

certain minimal boat safety equipment regulations. 33 *C.F.R.* §§ 175.1-175.201 (1981) (safety equipment requirements for pleasure boats). These safety regulations have been described as amounting to "modest equipment requirements," *e.g.*, life jackets and fire extinguishers, as compared to "rigorous safety regulations" for commercial craft. *United States* v. *Piner*, 608 F.2d 358, 359 (9th Cir. 1979).

But an individual traveling, or engaging in recreational activities aboard a pleasure boat does not lose all reasonable expectations of privacy simply because the boat and its use are subject to some government registration and safety regulations. *See Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979) (automobiles); *United States* v. *Piner*, 452 F. Supp. 1335, 1339 (N.D. Cal. 1978) (refusing to apply *Colonnade-Biswell* exception to safety inspection of sailboat), *aff'd on other grounds*, 608 F.2d 358 (9th Cir. 1979); *cf. Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313-14 (1977) (requiring warrant for federal OSHA inspections of business premises). Because few business or other activities are totally free from government regulation, acceptance of the Government's argument would turn the warrantless administrative search exception into the rule. *See Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313.

In fact, pleasure vessel owners enjoy a greater expectation of privacy aboard their boats than the occupants of automobiles. Unlike car drivers, a pleasure boat owner is not required to have an operator's license, *see* Note, "High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea," 93 *Harv. L. Rev.* 725, 742 n. 85 (1980) (no licensing or training requirements exist for operators of pleasure vessels), despite statistics which show that operator fault contributed to well over half of those boating accident fatalities occurring in 1981 for which some cause could be determined. U.S. Department of Transportation, Boating Statistics 1981, 25 (May 1982). Nor are pleasure boat owners required to carry third-party liability insurance. *Compare Delaware* v. *Prouse*, *supra*, 440 U.S. at 658-59; *Del. Code Ann.* tit. 21, § 2118 (as amended 1980) (requiring motor vehicle owner to carry mini-

mum amount of insurance). In addition, government-citizen contact on the wide expanse of lakes, bays and other inland waters is much less frequent and extensive than police-citizen contact on the public highways. *Compare Delaware* v. *Prouse*, *supra*, 440 U.S. at 662; *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973).

Most significantly, pleasure vessels are more than just a means of transportation. They are the private places of leisure, or homes away from home, where millions of Americans go to escape, if only temporarily, the pressures and troubles of the modern world. As the Fifth Circuit has said:

> The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel.

United States v. *Candena*, 588 F.2d 100, 101 (5th Cir. 1979). Many pleasure boats, like the *Henry Morgan II*, are equipped with living quarters, where the owner, his friends, family and/or crew may eat and sleep. Markow, *Small Boat Law* B3-18 (Supp. 1979-80) (in a small pleasure vessel, "the entire enclosed space usually constitutes living quarters").

Finally, boardings of pleasure vessels for documentation checks are much more intrusive than a stop of an automobile to examine the driver's license and car registration. Document inspections which involve comparing a pleasure vessel's main beam or interior hull number with the number appearing on the vessel's documentation will frequently bring government agents into the heart of this private living space. Note, "High on the Seas," *supra*, 93 *Harv. L. Rev.* at 743. By contrast, a police officer can conduct license and registration checks of automobiles without ever getting inside a car.

In short, because yachtsmen and other boaters enjoy a significantly greater expectation of privacy in their boats than do car drivers in automobiles, the warrantless administrative search exception cannot properly be applied to pleasure vessels. These vessels have not been subjected to such a pervasive

degree of federal regulation as to eliminate any reasonable expectation of privacy on the part of boat owners.[15]

B. Title 19 *U.S.C.* § 1581(a) Delegates Unrestrained Discretion To Customs Agents In The Selection Of The Vessels To Be Inspected And The Conduct Of Document Checks.

Aside from the fact that pleasure boating is not a prevasively regulated activity, application of the *Colonnade-Biswell* exception to this case is particularly inappropriate given the unfettered discretion granted customs agents by the sweeping boarding authority of 19 *U.S.C.* § 1581(a) (1977). Customs agents are permitted by this statute to conduct vessel document checks "at any time," not just during business or daylight hours. *See also* 46 *U.S.C.* § 277 (1977) (permitting inspection of vessel documentation "at all times"). This unlimited authorization contrasts sharply with the statutes involved in *Colonnade* and *Biswell*, which expressly limited inspections to business hours. 18 *U.S.C.* § 923(g) (1977) (firearms dealers); 26 *U.S.C.* § 5146(b) (1977) (liquor dealers). It is an open invitation to the random, nighttime boardings of pleasure vessels that the Ninth Circuit has held unreasonable in the context of Coast

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[15] It should emphasized that this case does not involve a boarding and documentation check of a commercial ship or vessel. Obviously, the master of a commercial ship has a much lesser expectation than does the operator-owner of a pleasure boat. A commercial ship "usually has a cargo area, dining area, engine area, an executive or administrative area, and other specialized areas where the seaman works, not where he lives." Markow, *Small Boat Law*, *supra*, B3-18. Moreover, fishing vessels, oil tankers and other types of commercial vessels may be subject to such pervasive government regulation as to bring stops and boarding of these vessels for purposes of administrative inspections within the *Colonnade-Biswell* exception. *See, e.g., State* v. *Casal*, 410 So. 2d 152, 154-55 (Fla.) (stop of fishing vessel to check registration and fishing permits), *cert. granted*, ___ U.S. ___, 51 U.S.L.W. 3217 (Dkt. No. 81-2318, 1982); Note, "High on the Seas,: *supra*, 93 *Harv. L. Rev.* at 741 n. 84. Despite the government's attempt to lump supertankers, fishing trawlers and ocean liners with cabin cruisers, yachts and sailboats, pleasure craft cannot fairly be equated with commercial vessels for purposes of fourth amendment analysis.

Guard safety and document inspections. *See United States* v. *Piner*, 608 F.2d 358, 361 (9th Cir. 1979).

Nor is the boarding authority of customs agents carefully limited as to place. Under § 1581(a), customs officers may step aboard "any vessel . . . at any place in the United States" to check documentation. Thus, § 1581(a) authorizes document inspections of commercial vessels, pleasure vessels, and even houseboats, whether underway, anchored, or moored to a dock, *see, e.g., United States* v. *Caraway*, 474 F.2d 25, 29 (5th Cir. 1973) (search pursuant to § 1581(a) of unoccupied houseboat moored at a dock, with engine dismantled and lying on dock), *vacated as moot*, 483 F.2d 215 (5th Cir. 1973) (*en banc*), whether afloat or on a trailer being towed by a truck or car, *see United States* v. *Tilton*, 534 F.2d 1363, 1364 (9th Cir. 1976) (search of ocean-going motorboat on trailer being towed by a truck in parking area adjacent to boat ramp); *United States* v. *James*, 528 F.2d 303, 304 (9th Cir. 1975) (speed boat loaded on trailer and towed twenty miles), *cert. denied*, 425 U.S. 960 (1976), and whether on public or private property, *e.g.*, moored in a private dock slip at a waterfront vacation home or aboard a trailer parked in a residential driveway. The statute cannot be read to restrict the conduct of regulatory inspections to only vessels on those inland waterways which lead from the coast to ports of entry: boardings are authorized "at any place" on the nation's inland waters.

Yet, § 1581(a) provides no standards to guide customs officials in their selection of vessels to be inspected. *Compare Donovan* v. *Dewey*, *supra*, 452 U.S. at 603-04 (Mine Safety and Health Act required inspection of *all* surface mines at least twice annually and *all* underground mines at least four times annually). In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1977), the Court refused to permit warrantless safety inspections at "reasonable times" of "any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer." 29 *U.S.C.* § 657(a) (1977). In an opinion by Justice White, the Court found this statutory authority "devolves almost unbridled discretion

upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. As 19 *U.S.C.* § 1581(a) delegates far greater discretion to customs agents to inspect or search any vessel, at any time, and at any place, the necessity for some type of fourth amendment safeguards is even more acute in this case.

Finally, § 1581(a) does not limit the scope or manner in which a document inspection is to be carried out. The statute authorizes customs agents to

> examine the manifest and other documents and papers and examine, inspect, and search the vessel . . . and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel . . ., and use all necessary force to compel compliance.

The statute essentially gives customs agents *carte blanche* authority to thoroughly inspect or search, for any one of a number of regulatory or law enforcement purposes, every nook and cranny of a vessel, from stem to stern, and anybody or anything found aboard. Unlike the firearms dealer in *Biswell* who was "not left to wonder about the purposes of the inspector or the limits of his task," *Biswell, supra*, 406 U.S. at 316, § 1581(a) provides no guidance to pleasure boat owners as to the purpose of any inspection undertaken by customs agents or the appropriate limits of a search for a particular regulatory purpose. The statute does not state that boardings for purposes of document inspections are confined to the vessel's weather decks, navigation spaces (*e.g.*, the bridge), and the hold where the vessel's main beam or interior hull identification number is located. *Compare Biswell, supra*, 406 U.S. at 311 (statute expressly authorized inspection of "places of storage" for "purpose of inspecting or examining . . . any firearms or ammunitions kept or stored by such . . . [firearms] dealer"; warrantless search of locked storeroom upheld). The purpose and scope of an inspection or search are left to the "unchecked discretion of Government officers." *Donovan* v. *Dewey, supra*, 452 U.S. at 604.

Concern with the lodging of unfettered discretion in government officials in the field was a central one to the framers of the fourth amendment. As colonists, they were inflamed by the massive invasions of privacy authorized by the infamous general warrants or writs of assitance, which granted sweeping power to customs officials to search at large in homes, stores, warehouses *and vessels* for smuggled goods.[16] *See Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 307; *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 355 (1977); Landynski; *Search and Seizure and the Supreme Court* 30-42 (1966); Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 51-78 (1937); Taylor, *Two Studies in Constitutional Interpretation* 35-38 (1969). Thus, in arguing in favor of adopting a Bill of Rights, James Madison stated that the federal government must be restrained from authorizing the collection of revenue pursuant to general warrants. 1 Annals of Congress 438 (1834 ed.).

The Government in this case is attempting to transform 19 *U.S.C.* § 1581(a) into a general warrant by arguing that customs agents exercising the unbridled discretion granted to them by that statute are effectively exempt from fourth amendment constraints. However, "no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973). In light of the history of the fourth amendment and the prior decisions of this Court, it is clear that § 1581(a) has not been drawn narrowly and carefully enough to serve as an adequate substitute for an administrative warrant, or for a requirement that the inspecting officer have at least a reasonable suspicion of a law violation. Thus, the random, mere-suspicion boarding of the *Henry*

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[16] While the writs of assistance permitted searches of land structures only in the daytime, vessels could be searched both during the day and night. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 n. 17 (1937). In 1768, a riot occurred in Boston when John Hancock's sloop *Liberty* was seized near sunset pursuant to a writ of assistance for landing Madeira wines without payment of duties. *Id.* at 72.

Morgan II, without a warrant, cannot be justified as a warrantless regulatory inspection in the *Colonnade-Biswell* mold.

POINT III

BECAUSE ALTERNATIVE METHODS FOR CHECKING VESSEL REGISTRATION ARE AVAILABLE WHICH ARE LESS INTRUSIVE ON INDIVIDUAL PRIVACY OR DO NOT INVOLVE THE EXERCISE OF UNBRIDLED DISCRETION, CUSTOMS OFFICERS MAY NOT CONDUCT RANDOM, WARRANTLESS BOARDINGS OF PLEASURE VESSELS TO CHECK DOCUMENTATION ABSENT A REASONABLE SUSPICION OF EITHER A BORDER CROSSING OR SOME VIOLATION OF LAW.

In *Delaware* v. *Prouse*, 440 U.S. 648 (1979), this Court concluded that random, mere-suspicion stops of vehicles by state police for the purpose of checking drivers' licenses and car registrations violated the fourth amendment. *Id.* at 663. The Court reasoned that the state had "alternative mechanisms available" which would be (1) more productive in promoting the state's interest in highway safety and which involved either (2) less intrusion on individual privacy or more effective constraints on the exercise of discretion by police officers in the field. *Id.* at 659, 663. Similarly, customs agents could employ numerous alternative identification procedures which would be less intrusive, or less discretionary than random, mere-suspicion stops and boardings of pleasure vessels for documentation checks. These alternative mechanisms would also be far more productive in promoting the federal interest in identifying pleasure vessels of foreign registry that have recently arrived in United States waters.[17] Consequently, customs offi-

[17] The Government's interest in promoting boat safety is not involved in this case. Customs Officer Wilkins boarded the *Henry Morgan II* for the asserted purpose of conducting a documentation check to determine whether the yacht was of foreign registry, and inquiring whether the vessel had recently come from foreign waters, and if so, whether it had reported to

cials cannot conduct random stops and boardings of pleasure boats for document checks without at least a reasonable suspicion of a border crossing or some violation of law.

The easiest and quickest method of identifying whether a pleasure yacht is of United States or foreign registry is through observation and verification of its visible markings. *Cf. Delaware* v. *Prouse*, *supra*, 440 U.S. at 660-61 (stop of Delaware-registered vehicles was not necessary to ascertain compliance with the state's registration requirements where state required vehicles to carry and display current license plates). Federal law requires that undocumented pleasure vessels equipped with propulsion machinery, including sailboats with auxiliary engines, "shall have a number issued by the proper issuing authority in the State in which the vessel is principally used." 46 *U.S.C.* § 1466 (1977).[18] This number is

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Customs. The government has never contended that Wilkins also boarded to conduct a vessel safety inspection.

In any case, such a contention could not succeed. The promulgation and enforcement of boat safety regulations has been delegated by statute and regulation to the Coast Guard. 14 *U.S.C.* § 2 (1976); 46 *U.S.C.* § 1454 (1977); 49 *C.F.R.* § 1.46(n)(1) (1981). Under the Federal Boat Safety Act of 1971, the Coast Guard may "delegate to any person, or private or public agency, or to any employee under the supervision of such person or agency, any work, business or function respecting the examination, inspection and testing necessary for compliance enforcement. . . ." 46 *U.S.C.* § 1457(a) (1977); 49 *C.F.R.* § 1.46(n)(1) (1981). While the Coast Guard has authorized "any Federal, State or local law enforcement officer" to inspect the state certificate of number required to be carried on board numbered, undocumented pleasure vessels, 33 *C.F.R.* § 173.23 (1981); *see* 46 *U.S.C.* § 1467 (1977); 33 *C.F.R.* § 173.21 (1981), the Coast Guard has not seen fit to delegate its responsibilities regarding enforcement of boat safety regulations to customs officials. Thus, customs agents do not have any authority to board pleasure vessels for the purpose of conducting safety inspections.

[18] The Commandant of the Coast Guard does have the authority to "exempt a vessel or class of vessels from the numbering provisions of [the Federal Boating Act of 1971] under such conditions as he may prescribe." 46 *U.S.C.* § 1468(a) (1977); 49 *C.F.R.* § 1.46(n)(1) (1981). To date, the Coast Guard has only exempted vessels (1) "used exclusively for racing" or (2) vessels equipped with propulsion machinery of less than 10 horsepower and

required to be "painted on, or attached to, each side of the forward half [*i.e.*, the bow] of the vessel for which it was issued." *Id.*, § 1470. *See also* 33 *C.F.R.* § 173.27 (1981) (requiring number to be in "plain vertical block characters of not less than 3 inches in height" and to "[c]ontrast with the color of the background and be distinctly visible and legible"). In addition, the vessel must carry a Coast Guard validation sticker "displayed within 6 inches of the number." 33 *C.F.R.* § 173.35 (1981). As can be seen from these requirements, if the option available to pleasure boat owners to document their vessels under federal law had not been retained in the Vessel Documentation Act of 1980, *see*, *supra*, note 13, customs agents could, with ease, separately identify pleasure vessels of United States and foreign registry without having to board to inspect vessel documentation.

Even documented pleasure vessels must carry some identifying markings which are visible to an approaching patrol boat. Thus, the Vessel Documentation Act of 1980 provides that the owner of a documented vessel "shall affix to the vessel and maintain in the manner prescribed by the [Coast Guard] the number assigned [to the vessel] and any other identification markings the [Coast Guard] may prescribe." 46 *U.S.C.* § 65f(c) (effective July 1, 1982). Coast Guard regulations presently require that for documented pleasure vessels, "the name and hailing port of the vessel must be marked together in clearly legible letters not less than four (4) inches in height on some clearly visible exterior part of the hull." 47 *Fed. Reg.* 27499 (June 24, 1982) (to be codified at 46 *C.F.R.* § 67.15-3(a)). Under these regulations, which are similar to those in effect at the time the *Henry Morgan II* was boarded, *see*, 46 *C.F.R.*

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used exclusively "as a tender for direct transportation between [a] vessel and the shore." 33 *C.F.R.* § 173.13 (1981). Even a tender is required to display the number of its mother vessel "followed by the suffix '1.'" *Id.*, § 173.13(b)(2). The *Henry Morgan II*, a 40-foot sailing yacht, was not a vessel designed exclusively for racing and was not being used for racing when approached by the customs patrol boat.

§ 67.13-9 (superseded July 1, 1982), customs agents admittedly could not tell from simply observing the markings on the respondents' sailboat whether the sailboat was of foreign registry. However, less intrusive methods of identification were available to the agents than boarding the *Henry Morgan II* to conduct a full-blown document inspection.

First, the agents could have checked by means of ship-to-shore radio, to see whether any vessel by the name of *Henry Morgan II* was documented. *See United States* v. *Castro*, 596 F.2d 674, 676 (5th Cir. 1979) (customs agents observing vessel named *Tanila* on the Intracoastal Waterway in Florida checked with the Coast Guard documentation officer in Washington, D.C., and were informed that no vessel of the name *Tanila* was documented), *cert. denied*, 444 U.S. 963 (1980). Under 46 *U.S.C.* § 65s (effective July 1, 1982), the Coast Guard is required to periodically publish "a list of all documented vessels together with any information pertaining to them that [the agency] considers pertinent or useful." Thus, the name *Henry Morgan II* could have been relayed to Coast Guard documentation officers ashore, who could easily have determined from a computer data bank, or the latest published list available, whether or not a vessel with that name had been documented under United States law. Moreover, listed information concerning any vessel documented under the name of the sighted sailboat could have been relayed to the customs officers and compared with the vessel's observed characteristics (*e.g.*, hailing port, type of rigging, tonnage). If the customs agents were informed that no vessel with the name *Henry Morgan II* was documented, or if the observed characteristics did not mesh with those listed under that name, the agents would have had reason to suspect that the vessel was of foreign registry.

Moreover, the customs agents could have engaged in the time honored custom of hailing the respondents' sailboat to ask questions concerning the nationality of the vessel, its point of departure and port of destination. *See, e.g., United States* v. *Green*, 671 F.2d 46, 48-49 (1st Cir. 1981) (inquiry by ship-to-ship radio, eliciting answers as to home port, last port of call

and destination); *United States* v. *Arra*, 630 F.2d 836, 838 (1st Cir. 1980) (hailing by radio; inquiry as to vessel's nationality, its last port of call and next port of call); *United States* v. *Cortes*, 588 F.2d 106, 107 (5th Cir. 1979) (approach and inquiry as to name, home port and nationality of vessel). Even under the 1790 customs laws, masters of vessels "bound to any port or place in the United States" were required to "give an account of the destination of such ship or vessel . . . upon request" by customs officers. Act of August 4, 1790, ch. 35, § 12, 1 Stat. 157. Hailing, either by human voice or radio, is a much less intrusive means of obtaining information concerning a pleasure vessel's nationality and its destination than boarding the vessel to make these inquiries. *See* Note, "High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea," 93 *Harv. L. Rev.* 725, 737 (1980) (questioning about vessel's origin, activities and destination "can be carried out with nearly equal effectiveness and much less intrusion on individual privacy by radio or by hailing"). Moreover, answers to questions can be quickly verified by means of ship-to-shore radio. *United States* v. *Streifel*, 665 F.2d 414, 420 n. 8 (2d Cir. 1981).

Aside from these alternative methods, which were in use at the time the *Henry Morgan II* was boarded, the government could adopt procedures in the future which would eliminate any need to conduct an intrusive boarding and document inspection in a case such as that presented here. *See Delaware* v. *Prouse*, *supra*, 440 U.S. at 659 (court must look at "the alternative mechanisms available, both those in use and *those that might be adopted*") (emphasis added); *Klutz* v. *Beam*, 374 F. Supp. 1129, 1133 (W.D.N.C. 1973) (three-judge court) (instead of conducting random warrantless, suspicionless boardings of boats for safety inspections, the "state could reasonably establish a procedure similar to that involving motor vehicles, requiring periodic inspection of safety and sanitation features with the posting of a sticker showing compliance with such inspection at a recorded time"). Under the ample authority recently granted the Coast Guard by Congress, 46 *U.S.C.*

§ 65f(c) (effective July 1, 1982),[19] regulations could be promulgated requiring every documented pleasure vessel to carry on the exterior of its hull the same marking, *i.e.*, the vessel number and a Coast Guard validation sticker, as are now required to be affixed to the bows of undocumented pleasure boats. This would enable customs agents, as well as other federal, state and local law enforcement officers, to immediately distinguish pleasure boats of foreign registry from those of United States registration. Not only would this identification procedure be much less intrusive on individual privacy, it would help government law enforcement officials to identify the nationality of pleasure vessels much more quickly and effectively than a series of boardings and documentation inspections, each involving the time-consuming search for the vessel number carved on an interior structural part of the hull. *See* 47 *Fed. Reg.* 27499 (June 24, 1982) (to be codified at 46 *C.F.R.* § 67.15-1).

Nor can it be said that the fraudulent use of numbers affixed to a foreign vessel's exterior could not be detected without a

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[19] Until recently, the Coast Guard's ability to require additional markings on the exterior of documented vessels was severely hampered by a statute, originally enacted in 1866, which required the number of a documented vessel to be "deeply carved or otherwise permanently marked on her main beam." 46 *U.S.C.* § 45 (repealed effective July 1, 1982); *see* Act of July 28, 1866, ch. 298, § 13, 14 Stat. 331. The Vessel Documentation Act of 1980 repealed this law, Pub. L. No. 96-594, Title I, § 127, 94 Stat. 3459 (December 24, 1980), and substituted a broad delegation of authority to the Coast Guard to require the vessel number to be affixed to the vessel in any manner the Coast Guard chooses to prescribe and to require "any other identification markings." 46 *U.S.C.* § 65f(c) (effective July 1, 1982). As the act's legislative history shows, the act was passed to "eliminate the administrative details of present law" and to "permit the Coast Guard to introduce modern procedure." H. Rep. No. 428, 96th Cong., 1st Sess. 4 (1979). Certainly, the adoption of a requirement that documented pleasure vessels carry identification numbers and validation stickers on the exterior of their hulls would be a long overdue improvement over the present system which hides the numbers from the view of cruising patrol officers by placing them solely on the interior side of the vessel hulls.

boarding. The numbers can be easily verified by the use of ship-to-shore radio and computers. *See United States* v. *Arra*, *supra*, 630 F.2d at 837-38 (computer check of Florida registration numbers). Moreover, the option allowing pleasure vessel owners to have their yachts documented and numbered under federal law has been retained at the behest of the yacht owners themselves, not the government, *see*, *supra*, note 13, despite the fact that federal law and Coast Guard regulations governing the numbering and marking of undocumented pleasure vessels do not require the carving of the state-issued number on interior hull structures of such vessels.

Aside from requiring exterior numbering and validation stickers, the need to board vessels such as respondents' sailboat to ascertain its nationality could also be obviated by other regulatory changes. For example, vessels documented after July 1, 1982, are required to "include the state, territory, or possession" as part of their hailing port marking. 47 *Fed. Reg.* 27499 (June 24, 1982) (to be codified at 46 *C.F.R.* § 67.13-7(d)). If this requirement were to be made retroactive, the present difficulty in distinguishing between vessels of foreign and domestic registry would be eliminated. Similarly, a second requirement that the hailing port for vessels documented after July 1, 1982, "be a place recognized by the United States Post Office as a bona fide mailing address" could also be made retroactive. *See id.* Directories of all possible "bona fide mailing addresses" in the United States could be obtained from the United States Postal Service and placed on board customs patrol boats. A quick thumbing through of such a directory would have told the agents in this case that "Basilea" was not a United States hailing port and that the *Henry Morgan II* was of foreign registry.

In addition to these less intrusive alternatives to random stops and boardings of vessels for identification purposes, the customs agents could also have employed more neutral procedures which would have involved less unbridled discretion in the selection of vessels to be boarded. First, the agents should have restricted the conduct of administrative vessel inspec-

tions to patrols launched for that limited purpose, instead of conducting an administrative vessel inspection during a patrol launched for criminal investigatory purposes. *See Michigan* v. *Tyler*, 436 U.S. 499, 508-09, 512 (1978). Second, the inspection could have been carried out pursuant to an administrative plan submitted to a judge or magistrate for prior approval. *See Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967). The plan could have provided for the selection of vessels to be subjected to a document inspection on the basis of neutral criteria, *e.g.*, a system whereby customs agents would be required to stop and board all vessels sighted with registration numbers ending in a specified two-digit number, or with names ending in a particular letter combination. Note, "High on the Seas," *supra*, 93 *Harv. L. Rev.* at 747-48 (numbers and letter combinations could be randomly generated in advance by computer).

A more neutral procedure could also have been utilized by the customs agents in the actual conduct of the documentation check aboard the *Henry Morgan II*. Instead of merely identifying himself, Officer Wilkins should have informed Mr. Hamparian, either orally or by means of a written warrant, of the purpose of the boarding, including a brief description of the areas or objects to be inspected or searched. *See Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. 307, 323 (1978) ("a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed"). By so informing a pleasure vessel owner, the boarding officer does not leave him "to wonder about the purpose of the inspector or the limits of his task." *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

Finally, the United States Customs Service could adopt regulations in the future which effectively limit the broad discretion granted customs officers by 19 *U.S.C.* § 1581(a) in selection of pleasure vessels to be inspected and in the conduct of these document inspections. Present regulations do not place any constraints on customs agents in the field. *See* 19 *C.F.R.* § 162.3(a)(1) (1981) ("A Customs officer, for the pur-

pose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board . . . [a]ny vessel at any place in the United States . . ."); *Delaware* v. *Prouse*, *supra*, 440 U.S. at 650 (patrolman in stopping car for license and registration check "was not acting pursuant to any standards, guidelines or procedure pertaining to document spot checks, promulgated by either his department or the State Attorney General"). A more narrowly drawn set of regulations could, for example, restrict boardings of pleasure vessels for document inspections to daylight hours; prohibit such inspections by boarding parties which do not consist wholly of customs officers, or by patrols which are not launched for the exclusive purpose of conducting administrative inspections; and restrict pleasure vessel document inspections to the inland waters of the United States lying between the sea and a customs port. Other regulations could expressly limit the scope of any document inspection to specified objects and areas of the vessel.

In short, a number of less intrusive, or more neutral procedures could have been used, or could be adopted in the future, to identify pleasure vessels of foreign registry. These procedures, if properly employed and administered, would result in the identification of many more pleasure vessels of foreign registry over a shorter period of time than a system of random, mere-suspicion stops and boardings to check vessel documentation. Thus, because more effective, less intrusive and less discretionary methods are available for identifying foreign pleasure vessels, persons aboard pleasure boats on United States inland waters may not for that reason alone have their travel, vacations, recreational activities and privacy interfered with at the unbridled discretion of customs agents. *See Delaware* v. *Prouse*, *supra*, 440 U.S. at 663.

The Government contends that the fourth amendment principles of *Delaware* v. *Prouse*, *supra*, are "land-based" and apply only to automobiles. However, this Court has consistently held or indicated that the fourth amendment "automobile exception" applies to full-blown criminal searches of vessels at

sea. *United States* v. *Ross*, ___ U.S. ___, 50 U.S.L.W. 4580, 4583 n. 8 (1982); *United States* v. *Lee*, 274 U.S. 559, 563 (1927); *see Carroll* v. *United States*, 267 U.S. 132, 149 (1925). Moreover, the lower federal courts have applied the investigatory stop principles of *Terry* v. *Ohio*, 392 U.S. 1 (1969), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), to criminal investigatory stops and boardings of vessels. *E.g.*, *United States* v. *Streifel*, *supra*, 665 F.2d at 422-23; *Blair* v. *United States*, 665 F.2d 500, 505 (4th Cir. 1981). The legislative history of the Vessel Documentation Act of 1980 further shows that vessel documentation "is somewhat similar to the registration of an automobile." H.R. Rep. No. 428, 96th Cong., 1st Sess. 4 (1979). *See also* 125 Cong. Rec. 7973 (Sept. 17, 1979) (remarks of Rep. Murphy) ("Documentation performs roughly the same function for vessels that registration does for automobiles").

The Government's contention cannot be sustained because the fourth amendment protects people, not places. *Katz* v. *United States*, 389 U.S. 347, 351 (1967). The basic principles of *Delaware v. Prouse*, proscribing unnecessary intrusion on individual privacy and interference with individual privacy at the unbridled discretion of an officer in the field are as applicable to a vessel document inspection on inland waters as to a car registration check on land. The fourth amendment "does not rust on exposure to salt air," *United States* v. *Williams*, 617 F.2d 1063, 1095 (5th Cir. 1980) (Roney, J., concurring), and a person taking his boat out for a Sunday sail or cruise should be entitled to the same fourth amendment safeguards that he enjoys Monday morning while driving to work.

Nor can *Delaware* v. *Prouse* be distinguished on the ground that a roadblock-type stop of vessels at sea is impracticable. Even assuming that a checkpoint stop of pleasure vessels would have been similarly impractical in the narrow waters of the Calcasieu Ship Channel, the Court's decision in *Prouse* did not turn solely on the availability of a roadblock stop of vehicles, but on the availability of a number of "alternative mechanisms . . . both those in use and those that might be adopted."

Prouse, *supra*, 440 U.S. at 659. The Court only suggested a roadblock-type stop as "one possible alternative." *Id.* at 663.

As the above discussion points out, there are numerous other alternatives to the unnecessary intrusion and unbridled discretion involved in random stops and boardings of pleasure boats for document inspections. *See United States* v. *Demanett*, 629 F.2d 862, 868 (3d Cir. 1980) ("But certainly there are alternatives other than unbridled discretion"), *cert. denied*, 450 U.S. 910 (1981). These alternative procedures or methods would be more effective in promoting the federal interest in identifying vessels of foreign registration than a hit-or-miss system of random boardings. Thus, customs agents may not at random and without a warrant board a pleasure vessel on inland waters without at least a reasonable suspicion of a border crossing or of some violation of law.

POINT IV

BECAUSE RESPONDENTS HAMPARIAN AND VILLAMONTE-MARQUEZ HAVE BEEN DEPORTED, THIS CASE IS MOOT.

An actual controversy must exist at all stages of appellate or certiorari review and not simply at the date the action is initiated. *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). Because the Government deported respondents Hamparian and Villamonte-Marquez after the Fifth Circuit rendered its judgment, the controversy in this case now lacks any "impact of actuality." *See United States* v. *Sarmiento-Rozo*, 592 F.2d 1318, 1320 (5th Cir. 1979) (deportation of eight Columbian seamen charged with attempted importation of marijuana mooted government's appeal from dismissal of indictment). The question of whether the fourth amendment rights of recreational boaters preclude customs agents from randomly stopping and boarding pleasure vessels for document checks should not be decided in the abstract.

The deportation of respondents is not analogous to the escape of a convicted defendant. *Compare Molinaro* v. *New*

Jersey, 396 U.S. 365, 366 (1970) (escape of convicted defendant "does not strip the case of its character as an adjudicable case or controversy"). The defendants are not fugitives from justice; they have been forcibly deported by another arm of the government. *Sarmiento-Rozo, supra*, 592 F.2d at 1320. Moreover, this case is not saved from mootness as presenting an issue "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515 (1911). Many, if not most, of the boats subjected to document checks or investigatory stops by customs officials are crewed by United States citizens.

As the case has been mooted by respondents' deportation, the Government's appeal should be dismissed.

CONCLUSION

In view of the arguments made and authorities cited above, the judgment of the court of appeals below should be affirmed. In the alternative, the government's appeal should be dismissed as moot.

Respectfully submitted,

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No. 81-1350

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ AND
ROBERT SORTGESE HAMPARIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents maintain (Br. 8-14) that the suspicionless boarding of their vessel was unconstitutional because the officers' purpose was not to conduct a documentation check but to gather evidence for use in a criminal prosecution. This argument lacks merit.

a. First, the record shows, as the court of appeals stated (Pet. App. 4a), that the officers "boarded the vessel to check documentation." The officers' purpose is shown by what they did upon boarding the *Henry Morgan II* and prior to acquiring probable cause for a search. Customs Officer Wilkins immediately identified himself and "told [respondent Hamparian] that he would like to check the documentation" (5/8/80 Tr. 35). "[W]ithin seconds to a couple of minutes" thereafter (Pet. App. 19a), Wilkins detected the odor of burning marijuana and saw in plain view burlap-wrapped bales of what he believed from experience was marijuana (Pet. App. 4a, 19a). Thus the officers' stated purpose for boarding was to conduct a document check; the officers were in the process of conducting a document check

when they acquired probable cause for the search; and there is nothing in the record to suggest that the officers would have done anything other than check the *Henry Morgan II's* documents if probable cause had not been acquired.

Respondents rely (Br. 8-11) upon the fact that the officers were investigating a report of criminal activity. However, even assuming that the officers hoped to find evidence of criminal activity while conducting a lawful document check, such motivation would not invalidate the inspection. This Court has squarely rejected the contention that an otherwise lawful search may be rendered unconstitutional by the subjective intent of the agents carrying it out. In *Scott* v. *United States*, 436 U.S. 128, 135-139 (1978), the Court held that compliance with a wiretap order's minimization requirement depended upon an objective assessment of the reasonableness of the interceptions and not upon the subjective intent of the agents. The Court stated (*id.* at 137): "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." Similarly, in *United States* v. *Robinson*, 414 U.S. 218, 236 (1973), the Court rejected the argument that a search incident to a lawful arrest was unconstitutional because the officer's motivation did not coincide with the legal justification for permitting such searches.

In accordance with these decisions, the courts of appeals have uniformly rejected the argument that otherwise lawful boardings and inspections of vessels by Customs or Coast Guard officers may be invalidated because of the motivation of the officers or their superiors. See, e.g., *United States* v. *Kent*, 691 F.2d 1376 (11th Cir. 1982); *United States* v. *Watson*, 678 F.2d 765, 769-771 (9th Cir. 1982); *United States* v. *Jonas*, 639 F.2d 200, 203 (5th Cir. 1981); *United States* v. *Arra*, 630 F.2d 836, 845-846 (1st Cir. 1980); *United States* v. *Demanett*, 629 F.2d 862, 868-869 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981). The reasoning of these and similar cases is persuasive.

First, there is "little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers." *United States* v. *Arra, supra*, 630 F.2d at 846. See also *United States* v. *Watson, supra*, 678 F.2d at 769. Such a rule, which would permit an inspection only where there is no suspicion, would turn the usual Fourth Amendment reasoning on its head. Second, "the difficulty of applying a subjective standard would be monumental" (*United States* v. *Arra, supra*, 630 F.2d at 846). See also *United States* v. *Watson, supra*, 678 F.2d at 770-771. Finally, if administrative inspections were prohibited whenever there are grounds for suspecting a criminal violation, administrative enforcement of important regulatory statutes would be seriously and unjustifiably hampered. For example, in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 320 (1978), this Court held that administrative search warrants may be issued under the Occupational Safety and Health Act based upon "specific evidence of an existing violation" of the statute. However, OSHA violations, which are punishable by civil penalties, may also constitute crimes in cases of willfulness. See 29 U.S.C. 666. Thus, under respondent's argument, if an employee reported a flagrant violation of OSHA, an inspection of the premises might not be possible. An administrative warrant might be unavailable because of the investigators' suspicion of a possible criminal violation, and a criminal search warrant would be unavailable unless there was probable cause in the criminal law sense. Such a result would obviously make no sense. See *United States* v. *Acklen*, 690 F.2d 70, 74 (6th Cir. 1982) (administrative search of pharmacy); *United States* v. *Consolidation Co.*, 560 F.2d 214, 220 (6th Cir. 1977) (administrative search of records of coal mine operator), cert. granted, vacated and remanded for reconsideration, 436 U.S. 942 (1978), judgment reinstated, 579 F.2d 1011 (6th Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

Rather than precluding otherwise valid administrative inspections whenever there is some suspicion of criminal activity, such inspections should be permitted "so long as

the extent of the intrusion is limited to the purposes specified in the statute" (*United States* v. *Jamieson-McKames Pharmaceuticals, Inc.* 651 F.2d 532, 542 (8th Cir. 1981)). Therefore, in the specific context at issue here, suspicionless boardings to check documentation should be upheld where the inspection is no broader than required to accomplish that purpose.

b. Respondents' reliance (Br. 8) upon *Michigan* v. *Tyler*, 436 U.S. 499 (1978), is entirely misplaced. Respondents invoke this Court's holding concerning investigatory searches of a fire-damaged building nearly a month after the fire had been extinguished and initial administrative searches had been lawfully undertaken to seek the cause of the blaze. In that situation, the Court held (*id.* at 512), "if the investigating officials * * * require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime." This holding is plainly inapplicable to the present case. First, it concerns not the permissibility of the search but merely the necessity of obtaining a warrant when there is evidence establishing probable cause and no justification for dispensing with the warrant requirement. Here, of course, the mobility of the *Henry Morgan II* justified proceeding without a warrant. Second, the portion of *Tyler* upon which respondents rely concerns the *reentry* of a building after prior administrative searches, and nothing in that decision supports respondents' contention that an initial and otherwise valid administrative entry is invalidated if criminal activity is suspected. Certainly a fireman's suspicion that he may encounter evidence substantiating a suspicion of arson would not invalidate an entry to fight the fire and view the scene. On the contrary, "once in a building [to put out a fire], firefighters may seize evidence of arson that is in plain view" (*id.* at 509). Furthermore, even after the fire is extinguished, neither the suspicion of arson nor the discovery of evidence of arson precludes reentry of the building for valid administrative reasons, such as investigating the cause of blaze. Thus, this Court held in *Tyler* (*id.* at 510-511) that investigators were

permitted to reenter the building without a warrant, probable cause, or reasonable suspicion even though they had already concluded that the fire " 'could have possibly been an arson' " and had discovered tangible evidence of arson, including "plastic containers of flammable liquid" and "suspicious 'burn marks in the carpet' " (*id.* at 502).

In this case, Customs officers did not seek "further access" to the *Henry Morgan II* after completing an administrative search. They boarded the vessel to check its documents and almost immediately detected the odor of marijuana and saw burlap-wrapped bales in plain view (see Pet. App. 4a). Nothing in *Michigan* v. *Tyler, supra*, casts doubt upon the legality of the officers' initial administrative boarding. And once on the vessel for this purpose, they were permitted to seize evidence of crime in plain view (436 U.S. at 509).[1]

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[1]Respondents' argument also draws little support from the lower court cases upon which they rely. In *Burkhart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1318 (7th Cir. 1980) (upholding OSHA inspection warrants), the court interpreted *Tyler* to mean that criminal, rather than administrative, probable cause "is required only when the investigation changes from purely administrative to criminal in nature." There is no reason to believe that this dictum meant anything more than what this Court held in *Tyler*; and as noted in text, that decision casts no doubt upon the legality of the boarding and document check in the present case. Similarly, in *Blackie's House of Beef, Inc.* v. *Castillo*, 659 F.2d 1211 (D.C. Cir. 1981) (upholding INS administrative warrants not based on criminal probable cause), the court merely quoted the Seventh Circuit's dictum in a footnote.

Respondents rely upon a statement (made without supporting authority) in the concurring opinion in *In the Matter of Searches & Seizures Conducted on October 2, and 3, 1980*, 665 F.2d 775 (7th Cir. 1981), but the court's decision is directly contrary to respondents' argument. In that case, evidence was seized from a pharmacy pursuant to an administrative warrant issued under 21 U.S.C. 880(d), and the operator of the pharmacy moved for the suppression and return of the seized property and alleged that the administrative warrant was a subterfuge to gather evidence of criminal activity (665 F.2d at 776). Affirming the denial of his motion without a hearing, the court of appeals held that the administrative warrant was sufficient. The court relied upon *United States* v. *Prendergast*, 585 F.2d 69, 70 (3d Cir. 1978), and *United States* v. *Goldfine*, 538 F.2d 815, 819 (9th Cir. 1976), which held that administrative inspections of pharmacies may be performed even though there is probable cause to believe that evidence of a

c. Respondents make much of the fact that Customs Officer Wilkins was accompanied by a state investigator when the boarding occurred (see Br. 9-14). However, the boarding by the state investigator was reasonable, lawful, and immaterial.

There is no mystery why the state investigator went on board. As the district court stated (Pet. App. 19a), Wilkins "boarded the vessel along with a companion for security purposes." Boarding vessels in waters frequented by drug smugglers is a dangerous business.

Respondents contend (Br. 10-11) that 19 U.S.C. 1581(a) and 46 U.S.C. 277 do not authorize boardings by state officials. But 19 U.S.C. 507 and 1595(b) expressly authorize Customs officers to obtain the assistance of state or local officials in making searches and seizures.[2]

Finally, even if the boarding by the state officer were unlawful, there would be no basis for suppressing the evidence found on the vessel. It was the Customs officer who

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crime will be disclosed. Accord, *United States* v. *Acklen, supra*; *United States* v. *Jamieson-McKames Pharmaceuticals, Inc.*, 651 F.2d 532, 541-542 & n.19 (8th Cir. 1981) (even where criminal charges are contemplated, administrative inspection of pharmaceutical manufactuer is valid so long as the extent of the intrusion is limited to the purposes specified by statute); *United States* v. *Wilbur*, 545 F.2d 764, 766 (1st Cir. 1976) (warrantless search of firearms dealer valid despite fact that proprietor under indictment).

United States v. *Lawson*, 502 F. Supp. 158 (D. Md. 1980) (inspection of pharmacy), conflicts with the court of appeals decisions just noted and is based solely upon a misreading of *Michigan* v. *Tyler*. Like *Lawson*, *Commonwealth* v. *Frodyma*, 386 Mass. 926, 436 N.E. 2d 925 (1982) (administrative inspection of pharmacy invalid where conducted for criminal investigatory purpose and warrant not sufficiently particular), conflicts with the previously noted court of appeals decisions and is unsupported by other federal authority or persuasive reasoning.

[2]Respondents also contend (Br. 10 n.1) that Louisiana law did not authorize the state investigator to board the *Henry Morgan II* even though La. Rev. Stat. Ann. § 34:851.14 (West 1964) empowered him "to stop and board any vessel for the purpose of * * * requiring appropriate proof of identification therefrom." Respondents cite no authority for their contention, and, more to the point, they do not even claim that state law prohibits state officers from assisting federal officers pursuant to express federal authorization.

first detected the odor of marijuana and spotted the bales of marijuana in plain view (see Pet. App. 4a). Thus, the evidence seized was not in any way attributable to the state investigator's presence.

d. Respondents argue (Br. 13-14) that suspicionless boardings to check documents are unnecessary "[b]ecause the characteristics of drug smuggling operations tend to generate articulable grounds for identifying violators." Not only is respondents' argument factually wrong (as attested by the countless tons of illegal drugs brought ashore each year), but it ignores the fact that the documentation laws serve other interests besides the interdiction of illegal drugs. And those interests remain important even when there is a suspicion of criminal activity.

2. Respondents do not contest the proposition that commercial vessels have long been subject to such pervasive government regulation that they fall within this Court's decisions permitting searches of "closely regulated" industries without probable cause or reasonable suspicion. See Resp. Br. 26 n.15. Respondents maintain (Br. 14-30), however, that the same is not true for "pleasure" craft and "recreational" vessels.

a. Respondents' argument is ironic, since the *Henry Morgan II* was not serving as a "recreational" boat at the time of its boarding but was instead plying a highly lucrative, albeit illegal, trade. In any event respondents' argument must be rejected. A rule permitting suspicionless boardings of commercial but not noncommercial vessels would be completely unworkable since it is often impossible to determine from a vessel's outward appearance whether it is being used for commercial or noncommercial purposes. As we noted in our opening brief, a vessel's outward markings do not even reveal whether it may lawfully be employed for commercial purposes, let alone whether it is in fact being used for such purposes. All federally documented vessels must bear the same outward markings, and both commercial and noncommercial vessels may be documented. Undocumented vessels are precluded from engaging in certain

commercial activities but are permitted to engage in all others. Similarly, foreign vessels may be lawfully employed for some commercial pursuits (e.g., international trade) but not for others (e.g., the coastwise trade). See our opening brief (at 23).

A vessel's size and type also do not reveal in many instances whether it is being used for commercial or recreational purposes. Some vessels originally constructed for commercial purposes are now used solely for recreation; some vessels designed primarily for recreational use are employed solely for commercial purposes, such as charter trips; and many types of vessels are commonly used both for commercial and noncommercial purposes.

If respondents' argument were accepted, persons violating the documentation laws could evade suspicionless boardings simply by employing the types of vessels most commonly used for recreation and by documenting those vessels for noncommercial use. Thus, unless Customs officers may conduct suspicionless boardings of both commercial and noncommercial vessels, they will be unable to enforce the documentation laws effectively. Respondents' entire elaborate argument (Br. 14-26) based upon the special status of "pleasure" and "recreational" vessels must consequently fail.

b. In our opening brief, we argued that suspicionless boardings and documentation checks are reasonable under the Fourth Amendment; as evidence of their reasonableness we noted (Br. 13-20) that Customs' authority to conduct such boardings and inspections dates back to statutes enacted in the earliest years of the Republic. Respondents attempt to refute our argument by contending (Br. 16-18) that the early statutes upon which we relied applied only to "merchant ships engaged in international trade." Respondents' construction of these statutes is clearly incorrect.

For example, Section 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 164—the first direct predecessor of 19 U.S.C. 1581(a)—authorized Customs officers to board all ships or vessels "in any part of the United States, or within four

leagues [12 miles] of the coast thereof, if bound to the United States * * * for the purposes of demanding the manifests * * * and of examining and searching" the vessels. The plain meaning of this provision is that Customs officers were authorized to board any vessel in inland waters for the purpose of demanding the manifest and other documents and thereby determining whether any dutiable goods were aboard.[3] There is nothing in the statute to suggest, as respondents maintain (Br. 17-19), that the officers were required to know before boarding a vessel in inland waters whether it had visited any foreign port.[4]

There is also no support for respondents' argument that this statute applied only to vessels devoted to commercial use. Respondents point (Br. 17-18) to the provision authorizing Customs officers to board "for the purpose of demanding [the ships'] manifests" and suggest that only merchant vessels were required to carry such documents. This argument is triply flawed. As previously noted, the provision upon which respondents rely empowered Customs officers to board a vessel for the purpose of finding out

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[3]The same appears to have been true under the first customs statute, Act of July 31, 1789, ch. 5, Section 5, 1 Stat. 37, which authorized a Customs agent to go on board arriving ships "to examine whether the goods imported are conformable to the entries thereof * * *." Implicit in this provision, we think, was the authority to board vessels for the purpose of determining whether there were any entries in the ship's documents for dutiable goods. It would have been unreasonable to require the officers to detect the presence of such entries or of the goods themselves prior to boarding.

[4]Respondents' argument is based upon the fact that vessels not in inland waters but within four leagues of the coast were subject to suspicionless boardings and inspections only "if bound to the United States" Even were respondents correct that greater liberality was permitted for boardings on inland waters than in customs waters, that would hardly aid their case, because they were boarded while on inland waters. In any event, the phrase in question meant only that the vessel had to be destined for this country and not simply in innocent passage through customs waters en route to a foreign country. Thus, a vessel travelling through customs waters on a voyage from Philadelphia to Boston was subject to boarding under the statute. There is nothing to support respondents' contention that the statutory phrase "bound to the United States" meant " 'bound to the United States' *from a foreign port or place*" (Br. 18; emphasis added).

whether it was carrying a manifest or imported cargo; the officers were not required to know beforehand that it was carrying such items. Thus, Customs officers could have boarded a pleasure vessel without suspicion in order to verify that it was not engaged in international trade. Second, any vessel carrying imported goods was required to have a manifest. Accordingly, this provision would have applied to any noncommercial vessel carrying such goods. Third, the same section of the 1790 act also authorized Customs officers to conduct suspicionless boardings "for purposes * * * of examining and searching" vessels. Thus, Customs officers were permitted to inspect not only the vessel's manifest but the vessel itself and the other documents required by the early documentation laws. There is no reason to assume that this broad power of inspection did not reach vessels used for recreational purposes. "[S]ailing for pleasure was a popular diversion in the American colonies at an early date" (23 *Encyclopedia Britannica* 858 (1971)), and the early statutes authorizing suspicionless inspections drew no distinctions based upon the purpose for which the vessel was being used.

c. In our opening brief, we argued (at 35-45) that federal regulation of vessel documentation is so pervasive and well-established that no one could have a legitimate expectation of privacy in a vessel's documents and identifying markings. Respondents' attempts to refute this argument are contradictory, inaccurate, or irrelevant.

Respondents first contend (Br. 20) that "the early vessel documentation laws cited by the government [do not] demonstrate a long history of pervasive regulation of pleasure vessels." Later, however, after noting that federal documentation of pleasure vessels dates from the first half of the 19th century, respondents change tack and argue (Br. 22; emphasis added) that "*[w]hile the history of the federal documentation of pleasure vessels may be long*, the fact that primarily private, nongovernmental interests have been served by this 'regulation' cannot be ignored." We frankly fail to see the point of this argument. Pervasive, mandatory regulation of a particular activity is relevant in the present context because it dilutes or eliminates any legitimate expectation of privacy on the part of persons engaged in

that activity. No matter what the regulation's purpose, however, its effect upon privacy expectations would appear to be the same.

What respondents seem to be suggesting is that the documentation of pleasure vessel is not mandatory. Respondents state (Br. 22): "federal documentation has not been involuntarily imposed on pleasure vessels * * * but rather has taken the form of a desirable option held out to pleasure boat owners * * *". But while it is true that pleasure boats need not be "documented" within the meaning of 46 U.S.C. (& Supp. IV) 65 *et seq.*, all vessels with propulsion machinery must have either federal documentation or a "certificate of number" issued by a state pursuant to a uniform federal plan (46 U.S.C. 1466-1467).

Moreover, it is simply not true, as respondents' suggest (Br. 22), that this comprehensive system of vessel identification and registration is designed to serve "primarily private, nongovernmental interests." As we noted in our opening brief (at 22), this system provides the only reliable method of identifying vessels and is consequently vital to the enforcement of all maritime laws.

Respondents contend (Br. 24) that "pleasure vessel owners enjoy a greater expectation of privacy aboard their boats than the occupants of automobiles". However, for the reasons explained in our opening brief (at 42-43) this argument is obviously invalid. Respondents note (Br. 25) that vessels often contain living quarters, but as we took pains to emphasize at the beginning of our opening brief (at 11), this case concerns nothing more than the legality of a suspicionless boarding and request for documents; it "does not involve the right of Customs officers, without probable cause or reasonable suspicion, to search an entire vessel" including its "living spaces * * * or the personal belonging of those on board."

Respondents argue (Br. 25) that "boardings of pleasure vessels for documentation checks are much more intrusive than a stop of an automobile to examine the driver's license and car registration" because "a police officer can conduct license and registration checks of automobiles without ever getting inside a car." However, a police officer conducting such a check is able to look through the car's windows and observe everything in the passenger compartment. By

contrast, a Customs officer conducting a documentation check does not view the entire vessel but only the weather decks, navigational spaces, and the portion of the hold where the identification number of documented vessels may be found on a "clearly visible interior structural part of the hull" (47 Fed. Reg. 27499 (1982) (to be codified at 46 C.F.R. 67. 15-1)).[5] See our opening brief (at 35-36). Contrary to respondents' contention, inspecting a vessel's identification number usually does not "bring government agents into the heart of this private living space" (Br. 25). On large federally documented vessels, the identification number is usually found in the hold, not in the crew or passenger quarters. In addition, most pleasure craft are not federally documented and thus have only a state-issued number displayed on the exterior of the boat (46 U.S.C. 1470) rather than a federal identification number on the interior of the hull.

d. In our opening brief, we contended (at 41-42) that persons aboard any foreign vessel in inland waters cannot have a legitimate expectation that the vessel will be free from boarding and inspection, since foreign vessels are required to report their arrival to Customs and make formal entry and may then be subjected to a thorough border search. Respondents concede (Br. 21 n.12) that the *Henry Morgan II* was a foreign vessel required to make entry, but they argue (*ibid.*) that the "customs official in the case at bar did not even have a reasonable suspicion that the *Henry Morgan II* was of foreign registry." Even if this argument were true, we fail to see what bearing it would have upon respondents' legitimate expectation of privacy. In any event, the foreign-sounding name of the vessel's home port— "Basilea"—coupled with respondent Hamparian's apparent inability to speak English, provided reasonable suspicion that the *Henry Morgan II* was registered abroad.[6]

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[5]The obvious reason for requiring the identification number to be placed on the structural part of the hull is not to provide a pretext for officers to enter the hold but because the structural part of the hull is the portion of the vessel least likely to be destroyed or modified.

[6]We need not demonstrate that these facts conclusively established or even provided probable cause to believe that the *Henry Morgan II* was of foreign registry. Certainly they provided at least reasonable suspicion for the Customs officer's belief—which proved correct—that the vessel was not documented in this country. Contrary to respondents' apparent

e. Respondents contend (Br. 26-30) that 19 U.S.C. 1581(a) violates the Fourth Amendment because it does not limit the time, place, and manner in which suspicionless boardings and documentation checks may be performed. However, respondents' arguments ignore the imperatives of the maritime environment and attack procedures not at issue here.

Respondents complain (Br. 26) that 19 U.S.C. 1581(a) permits boardings and document checks " 'at any time', not just during business or daylight hours." We fail to see the relevance of this argument, because the boarding of respondents' vessel occurred at midday (see Pet. App. 3a). Furthermore, vessels do not have "business hours" like offices and factories. Except when moored or anchored in sheltered waters, persons on vessels must keep watch at all times. In addition, a rule prohibiting nighttime boardings and inspections would permit vessels to operate at night in violation of the documentation laws. During daylight, they could cease their illegal activities or remain in waters where boardings and inspections are less likely.

Respondents complain (Br. 27) that 19 U.S.C. 1581(a) authorizes boardings and inspections of vessels "at any place in the United States." They suggest (Br. 27) that it would be unconstitutional if Customs officers invoked the statute as authority for boarding and inspecting a moored houseboat lacking means of propulsion or vessels that have been removed from the water. These arguments are obviously irrelevant to the case at hand, which concerns the boarding of a seaworthy vessel in a ship channel leading from the open sea to a Customs port of entry.

Respondents complain (Br. 27-28) that 19 U.S.C. 1581(a), unlike the mine inspection laws at issue in *Donovan* v. *Dewey*, 452 U.S. 594 (1981), does not require a certain number of inspections per year. This argument ignores the obvious fact that vessels, unlike mines, are highly mobile. Mine inspectors know where mines are located and can

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suggestion (Br. 21 n.12), reasonable suspicion does not require the ruling out of all contrary inferences. Thus, it is not determinative that "Basilea" might have been an obscure, foreign sounding American town or that respondent Hamparian might have been a laconic or non-English speaking American or a foreign crewman or passenger on an American vessel.

therefore schedule inspections in advance. Customs officers usually do not know where a particular vessel is located or which vessels they will encounter while on patrol. In addition, some vessels are absent from United States waters for long periods, and others visit those waters only briefly. It would therefore be impossible for Customs officers to schedule document inspections in advance or to inspect each vessel a certain number of times each year—especially with respect to foreign vessels used for smuggling such as the *Henry Morgan II*.

Finally, respondents complain (Br. 28) that 19 U.S.C. 1581(a) "essentially gives customs agents *carte blanche* authority to thoroughly inspect or search, for any one of a number of regulatory or law enforcement purposes, every nook and cranny of a vessel, from stem to stern, and anybody or anything found board." Once again, respondents are attacking a strawman. All that is at issue here is the legality of a suspicionless boarding and document check.

f. Respondents also maintain (Br. 23-24) that pleasure vessels are not subject to pervasive regulation. As previously noted, however, it is often impossible to determine from a vessel's outward appearance whether it is engaged in commercial or noncommercial activity. As a result, what is significant, in our view, is that vessels in general are indubitably subject to pervasive government regulation. Furthermore, even if it were reasonable to focus solely upon pleasure vessels, respondents' summary (Br. 23-24) of the laws applicable to such vessels is grossly deficient. For example, not only must such vessels comply with certain safety regulations and have a federal certificate of registration or a state-issued certificate of number, but they are prohibited from engaging in certain trades and must comply with detailed rules regarding entry and clearance if they come from or go to a foreign port. See Pet. Br. 23-24. In addition, while noncommercial vessels are admittedly not regulated to the same degree as commercial craft, what is important for present purposes is that the *documentation* of such vessels has long been subject to detailed federal regulation. All that is claimed in this case is the authority to board and conduct a check of documents. It is thus irrelevant whether federal regulation of other aspects of pleasure boating is

sufficiently pervasive to justify suspicionless inspections of other portions of such vessels.

3. Respondents argue (Br. 30-40) that suspicionless boardings and document checks are unreasonable because there are less intrusive means of enforcing compliance with the documentation laws. However, respondents have failed to identify any practicable and satisfactory alternatives.

Respondents begin (Br. 31) by asserting that "[t]he easiest and quickest method of identifying whether a pleasure yacht is of United States or foreign registry is through observation and verification of its visible markings." Two pages later, however, they concede (Br. 33) that "customs agents admittedly could not tell from simply observing the markings on [the *Henry Morgan II*] whether [it] was of foreign registry." See also our opening brief (at 28-29). Moreover, respondents' argument erroneously presupposes that Customs' interest in conducting document checks is limited to foreign vessels. On the contrary, however, enforcement of the documentation laws also requires document checks of American vessels to determine, for example, whether they have complied with the laws regarding entry and clearance and whether they are licensed for a particular trade.[7]

Respondents suggest (Br. 33) that the Customs officer "could have checked by means of ship-to-shore radio, to see whether any vessel by the name of *Henry Morgan II* was documented." This argument ignores the fact that in many instances, such as this case, Customs officers must patrol in boats without radios. Furthermore, even if radio contact had been made, the information available from the Coast Guard documentation office is far more limited than that contained in the vessel's documents. For example, no information is available concerning foreign vessels or

[7]Customs officers may also check to see whether American vessels have the required certificates of inspection. See Pet. Br. 25. Respondents' claim (Br. 30 n.17) that Customs officers may not enforce the safety laws is inaccurate. Customs officers are specifically authorized to board vessels to enforce all navigation laws (19 U.S.C. 1581(b)) and to enforce all shipping laws (46 U.S.C. 494, 495). And even if other governmental agencies were solely responsible for such aspects of maritime regulation, that fact would not in the least enhance respondents' legitimate expectation of privacy while sailing in American waters.

numbered boats. See our opening brief (at 31-32). In addition, because a vessel's outward markings may be easily altered and falsified, Customs officers could not be sure that the information provided by the documentation officer pertained to the vessel they had sighted. It would not be difficult for those engaged in documentation law violations to paint on the stern of their boat the name and hailing port of a similar, documented vessel.

Respondents argue (Br. 34-40) that even if at present there are no satisfactory alternatives to suspicionless boardings and document checks, such alternatives could be developed. Respondents then recommend (Br. 34-36) changes in the law so that the nationality of American vessels would be apparent from their outward markings. As previously noted, however, merely ascertaining that a vessel is American would not necessarily obviate the need to check its documents. In addition, the changes recommended by respondents would do little to prevent the falsification of vessels' outward markings.

Contrary to respondents' suggestion (Br. 33-36; see also Br. 20 & n.9) neither the use of sophisticated technology nor drastic, expensive modifications in present recordkeeping procedures would be an adequate substitute for actual examination of a vessel's documents. For example, by examining a vessel's documents Customs officers can often determine whether the vessel has visited any foreign port or taken on foreign merchandise. It is difficult to envision how the government could obtain such information by any alternative means short of maintaining surveillance of all vessels at all times. Conceivably the government could itself affix identifying markings to the outside of all American vessels. Conceivably the government could take steps to prevent vessels from exhibiting false markings—such as by requiring every vessel to report for periodic inspection of its markings. Conceivably the government could place in a central computer every piece of information available concerning every vessel—including every fact contained in the vessel's "certificate of documentation" or "certificate of number," its licenses, safety inspection certificates, and manifests previously furnished to Customs. Conceivably the government could implement a communications system to permit every Custom agent to gain access to all this

information from any place in the United States at any time of the day or night. Yet despite these drastic, expensive modifications of present procedures, if a vessel were spotted by a Customs patrol, the officers would usually have no way of ascertaining where it was coming from or what it was carrying.

Respondents argue (Br. 36-37) that so-called "neutral" criteria should be used for determining which vessels are to be boarded, but we believe that the use of such criteria would be a pointless, expensive exercise. See *United States* v. *Arra, supra*, 630 F.2d at 842. This is illustrated by respondents' suggestion (Br. 37) that Customs implement a procedure requiring officers "to stop and board all vessels sighted with registration numbers ending in a specified two-digit number, or with names ending in a particular letter combination." On many patrols during which few vessels are sighted, such a system would mean that no vessels could be boarded, and the cost of conducting the patrol would be wasted. Altering the criteria for boarding from trip to trip so that a sufficient number of vessels would be boarded would impose a severe administrative burden without any commensurate benefits, since the flexibility of the criteria employed would not appreciably limit the discretion about which respondents complain.

Respondents contend (Br. 37) that officers boarding vessels for document checks should be required to inform those on board "either orally or by means of a written warrant, of the purpose of the boarding, including a brief description of the areas or objects to be inspected or searched." In this case, however, upon boarding the vessel, the Customs officer identified himself and "told [respondent Hamparian] that he would like to check the documentation" (5/8/80 Tr. 35). Thus, Hamparian was effectively advised of the purpose of the boarding and the items to be inspected. In any event, we know of no support for the proposition that an otherwise lawful, warrantless search or inspection is invalidated if the officers carrying it out fail to convey such information to persons encountered on the premises.

4. Finally, respondents claim (Br. 40-41) that this case is moot because they were deported following the reversal of

their conviction by the court of appeals. In our view, this contention is insubstantial[8].

"In general a case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (citations omitted). Here, there is clearly a live controversy between the government and respondents, and both parties retain legally cognizable interests in the outcome of this case. Respondents were convicted of serious crimes and sentenced to lengthy prison terms. If the court of appeals' decision is reversed and respondents' convictions are reinstated, the government will be able to seek their extradition if they are found in any of the numerous countries with which the United States has treaties of extradition covering the offenses for which they were convicted. Even if extradition is not possible, reversal of the decision below would permit the government to arrest respondents and require them to serve their lengthy prison sentences if they were to reenter this country. Given the habits of persons engaged in the drug trade, it is not at all unlikely that respondents will return to United States waters. Finally, reversal of the decision would, at a minimum, provide grounds for respondents' exclusion under 8 U.S.C. 1182(a)(9) as "[a]liens who have been convicted of a crime of moral turpitude" should they ever seek to enter this country legally.[9]

United States v. *Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971), is closely on point. There, the defendant was given a suspended sentence and placed on probation " 'on condition that he return to Mexico and not return to the United States illegally' " (*ibid.*). He was then deported (*ibid.*). This Court held (*ibid.*):

> Clearly, the fact that the respondent is now out of the country does not render this case moot. He is still

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[8]If respondents were correct in their assertion of mootness, the proper remedy would not be to dismiss the writ of certiorari, as respondents apparently suggest (Br. 41), but to vacate the judgment of the court of appeals. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288 n.9 (1982); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

[9]If the reversal of respondents' conviction is allowed to stand, respondents presumably would not be persons who "have been convicted" within the meaning of this statute. See *Lewis* v. *United States*, 445 U.S. 55, 61 n.5 (1980).

under the sentence of the District Court and on probation subject to conditions imposed by the District Court. Should he violate those conditions, he will be subject to imprisonment under his continuing criminal sentence.

While it is the government, rather than the deportee, who seeks review in the present case, the same reasoning applies. In both cases, the effects of outstanding criminal sentences, even if unenforceable as a practical manner, are sufficient to preserve a live controversy.[10]

As far as the doctrine of mootness is concerned, respondents' situation is not materially distinguished from that of a fugitive who leaves the country while an appeal by the prosecution is pending. In both instances, the controversy between the parties is equally alive, and the legally cognizable interest of the litigants are largely the same. While the courts may decline to entertain a fugitive's appeal, "such an escape does not strip the case of its character as an adjudicable case or controversy" (*Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970)). To be sure, as respondents correctly note (Br. 41), a deportee is expelled from the country whereas a fugitive flees by his own choice. But, as *Campos-Serrano* illustrates, this distinction has no bearing upon whether a live controversy between the parties remains. What respondents are really contending is not that their case is moot, but that deportation must be deemed a waiver of the government's right to seek further review, much as a fugitive is disentitled to maintain an appeal while he remains at large (*United States* v. *Campos-Serrano, supra*, 404 U.S. at 294 n.2). However, we fail to understand why the United States should be deprived of its right to seek further judicial review merely because it arranged for respondents to return to their homeland rather than seeking

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[10]In *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977), this Court held that a state's appeal in a criminal case was not moot even though the defendant had completed his sentence, because the judgment below reversing his conviction prevented the state from imposing certain collateral consequences stemming from the conviction. Here, the government is prevented by the judgment below from imposing upon respondents the direct consequences of their convictions—i.e., their prison sentences—not to mention significant collateral consequences, such as exclusion pursuant to 8 U.S.C. 1182(a)(9).

to keep them in custody after reversal of their convictions or permitting them to remain at liberty in this country in violation of the immigration laws. Certainly the government's election did not prejudice respondents. On the contrary, the only adverse effect of deportation may have been upon the government's ability to enforce the district court's judgment if it is subsequently reinstated. And unlike a fugitive, the government acted legally in deporting respondents and will of course abide by any decision of this Court.[11]

In sum, respondents' deportation did not render this case moot.[12] Much is still at stake here both for the government and respondents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[11] *United States* v. *Sarmiento-Rozo*, 592 F.2d 1318 (5th Cir. 1979), upon which respondents rely (Br. 40-41), while in our view probably incorrect, is in any event inapposite. There, the court dismissed the government's appeal from a *pretrial* order dismissing the indictment against aliens who had been deported in the interim. Since there had been no conviction, the court reasoned (592 F.2d at 1320-1321) that the district consequences of dismissing the appeal would be minimal and that the "mere possibility" of adverse collateral consequences for the government—which the court discounted (*id.* at 1321 n.2)—was insufficient to warrant a decision on the merits.

[12] Respondents do not contend that this case was mooted by the dismissal of the indictment or by their release to the custody of the Immigration and Naturalization Service. Those actions were taken in compliance with the court of appeals' mandate, and thus they clearly do not deprive this Court of jurisdiction. See, e.g., *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931).

Supplemental Petitioner's Brief

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No. 81-1350

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief is submitted at the request of the Court to address the question, raised for the first time at oral argument, whether dismissal of the indictment in this case following the reversal by the court of appeals of respondents' convictions rendered this case moot.

1. The facts relevant to this issue are as follows. On August 3, 1981, the court of appeals reversed respondents' convictions on the ground that illegally seized evidence had been admitted at trial (Pet. App. 1a-16a; J.A. 2). The government's petition for rehearing was denied on October 19, 1981, and the court of appeals' mandate subsequently issued (Pet. App. 23a-24a; J.A. 2). Since the court of appeals' decision dictated suppression of virtually all of the evidence against respondents, it was apparent that they

could not be retried.[1] Accordingly, on December 21, 1981, the United States Attorney moved for dismissal of the indictment, and the indictment was dismissed (J.A. 2).[2] The petition for a writ of certiorari was filed on January 18, 1982.

2. We submit that there is no basis for holding that the case was mooted by dismissal of the indictment during the pendency of the appellate proceedings, and that a contrary ruling would subject the courts and the parties in future cases to a substantial burden in making and passing upon stay applications that serve no practical function other than to circumvent the consequences of such a ruling.

Ordinarily, claims of mootness arise in circumstances in which events outside the litigation itself (even if done in reponse to developments in the litigation) have so altered the circumstances of the parties that the order of the court before which the case is pending can no longer affect the rights, duties, or actions of the parties. This is plainly not such a case.

a. A case is not moot if the parties retain " 'a legally cognizable interest in the outcome.' " *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (citations omitted). In our reply brief at 18-19, we explained why reinstatement of respondents' convictions would affect legally cognizable interests of both

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[1]We also note that unless a retrial date had been scheduled promptly it would not have been possible to begin the retrial within the time prescribed by 18 U.S.C. (Supp. V) 3161(e), which requires that retrial commence within 70 days after the appellate reversal "becomes final." Where certiorari has not been sought, the phrase "becomes final" has been construed to mean the issuance of the court of appeals' mandate or its receipt by the district court. See *United States* v. *Mack*, 669 F.2d 28, 33 (1st Cir. 1982); *United States* v. *Ross*, 654 F.2d 612, 616 (9th Cir. 1981), cert. denied, 455 U.S. 926 (1982); *United States* v. *Gilliss*, 645 F.2d 1269, 1276 (8th Cir. 1981).

[2]Copies of the motion and the dismissal order are appended hereto.

the government and respondents. Therefore, unless dismissal of the indictment prevents reinstatement of respondents' convictions, it must follow that this case is not moot.

We are aware of no support for the proposition that dismissal of an indictment bars reinstatement of an incorrectly reversed conviction. Ordinarily, of course, an indictment is required in order to *try* a defendant on federal felony charges. The Fifth Amendment provides that for certain offenses "[n]o person *shall be held to answer* * * * unless on a presentment or indictment of a Grand Jury" (emphasis added). Rule 7(a), Fed. R. Crim. P., similarly requires that felonies be "prosecuted" by indictment, unless waived. These requirements protect against arbitrary and oppressive prosecutions by insuring that no person will be held to answer for a felony under federal law unless a grand jury has found probable cause to believe that he committed the offense with which he was charged. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). But when, as in this case, the trial has been completed, a conviction has been entered, and there is no prospect of retrial, the indictment is of no further use. If the judgment below is affirmed, there could never be a retrial even if the indictment were outstanding because there would be insufficient evidence to avoid acquittal. Similarly, reinstatement of respondents' convictions following reversal of the judgment below would obviate any need for retrial. Thus, in either event, the indictment in this case has served its purpose and its dismissal was of no consequence.

b. Moreover, the indictment in this case was dismissed solely in order to comply with the court of appeals' mandate, and it is well established that a case is not mooted when a litigant complies with an unfavorable judgment prior to the disposition of his appeal, provided a subsequent reversal of that judgment by a higher court would have

meaningful consequences for the parties.[3] See, *e.g.*, *Mancusi* v. *Stubbs*, 408 U.S. 204, 206 (1972); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931).

It is true, as was noted during oral argument, that the judgment of the court of appeals in this case simply reversed respondents' convictions and did not in so many words order dismissal of the indictment (Pet. App. 21a). If sufficient evidence had remained, respondents could have been retried. But since the court of appeals' decision demanded suppression of essentially all the evidence upon which respondents' convictions were based, that decision, if not reversed, unquestionably required dismissal of the indictment as a practical matter. We submit that this was sufficient to bring this case within the rule that compliance with an adverse judgment pending appellate review does not moot the case.

Mancusi v. *Stubbs*, *supra*, is closely on point in this regard. In that case, the court of appeals reversed a district court decision that had denied habeas corpus relief to a state prisoner who claimed that his sentence as a second offender was unconstitutional. The state petitioned for a writ of certiorari but did not seek a stay of the mandate of the court of appeals (408 U.S. at 205). Instead, the state resentenced the prisoner (*id.* at 205-206). This Court held that a live controversy remained despite the resentencing because "[p]etitioner's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case" (*id.* at 206). However, as Justice Marshall observed in dissent (*id.* at 218), the letter of the mandate in *Mancusi* did not require resentencing. All that the mandate

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[3]This rule is necessarily limited to situations in which the party seeking further review initiates the action claimed to have rendered the case moot. Thus, the mere fact that the government moved to dismiss the indictment is not determinative here.

required in the strictest sense was that the state "abandon[], temporarily, its attempt to impose an enhanced recidivist sentence, pending review of the judgment below" (*ibid.*).[4] However, eight members of the Court rejected this technical argument, apparently concluding that for all practical purposes resentencing was required by the court of appeals' mandate.

The same approach is even more justified here than in *Mancusi.* In *Mancusi,* the prisoner was resentenced to obviate the need to comply with the writ of habeas corpus, "the traditional function of [which] is to secure release from illegal custody" (*Preiser* v. *Rodriguez,* 411 U.S. 475, 484 (1973)). Simply submitting to the court of appeals judgment might have resulted in the prisoner's release but not in resentencing. In this case, on the other hand, the court of appeals' judgment, which effectively precluded retrial, and 18 U.S.C. (Supp. V) 3161(e), which establishes a time limit within which a case must be retried following appellate reversal, would have permitted dismissal of the indictment with or without the government's consent.

In essence, then, the teaching of *Mancusi* is that a reversal of the judgment of a lower court by the Supreme Court serves to vacate that judgment and to nullify all that was done under the mandate embodying the erroneous judgment. On the other hand, if the judgment is left standing, either by denial of review or by affirmance, that which was done in execution of the mandate remains valid. As applied to the instant case, this principle means that if this Court

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[4]As a second offender, Stubbs was sentenced to consecutive terms of imprisonment totalling 55 years. As a first offender, he could have been sentenced to a maximum of 17 years. *United States ex rel. Stubbs* v. *Mancusi,* 442 F.2d 561, 562 n.1 (2d Cir. 1971). At the time of this Court's decision, he had apparently served not more than six years (see *id.* at 562).

affirms the judgment of the court of appeals, the indictment stands dismissed and the prosecution is at an end. If it reverses, the dismissal is a nullity and the case should proceed as though it had not occurred. Such an outcome is an entirely practical and sensible one that fully safeguards the rights of the parties.

3. If the dismissal of the indictment here is to be held to have mooted the case, it can be only because (1) the Court creates an arbitrary rule in this case that dismissal equals mootness, or (2) the dismissal is fairly understood to be evidence of the intent of the United States to abandon its effort to obtain a judgment against respondents. The first rationale would be in essence circular, and can be justified only if independently supported by indentifiable policies of judicial administration or fairness to the parties. Thus it is to the second, more empirical consideration that we now turn.

There is no room for serious argument that the dismissal motion constituted an actual abandonment of the entire prosecution by the government. Quite plainly, it was a mere matter of housekeeping — of apprising the district court that the government had no intention of retrying the case without the evidence that the court of appeals had held inadmissible. Any contention that the government intended to abandon the enforcement of the favorable district court judgment is necessarily belied by its action in filing a petition for a writ of certiorari. Moreover, under the regulations of the Department of Justice (28 C.F.R. 0.20), the United States Attorney lacks authority to decide to abandon a case after an adverse decision by a court of appeals unless and until the Solicitor General has determined that review by this Court will not be sought. Since the United States Attorney lacked the authority to decide to abandon a case at the stage at which that the dismissal motion was filed

in this case (and, of course, that plainly was not his intention), it makes no sense to conclude that the United States meant to abandon the case when the officer charged with the power to make that decision in fact decided to proceed.

It is of course true that the United States could have sought from the court of appeals or this Court a stay of the mandate of the court of appeals. But this Court has not required that a stay of an adverse lower court judgment be obtained in order to preserve a live controversy. See, *e.g.*, *Mancusi* v. *Stubbs, supra,* 408 U.S. at 207; *Bakery Drivers* v. *Wagshal,* 333 U.S. 437, 442 (1948). Accordingly, it has not been our practice to seek stays of judgments that simply reverse a criminal conviction, even when we intend to seek certiorari. A rule that would require us to do so in order to preserve our right to seek Supreme Court review would be most undesirable, prompting an unnecessary and burdensome flood of stay applications. The Federal Rules of Appellate Procedure call for issuance of the court of appeals' mandate 21 days after entry of judgment or seven days after denial of a petition for rehearing (Rule 41(a)). It is virtually impossible for the Solicitor General to reach a decision regarding certiorari within such a brief period. Before any decision is reached, the United States Attorney must learn of the adverse decision or denial of rehearing, notify the Department of Justice, and provide his recommendation regarding further review. Then recommendations must be prepared by the responsible Division of the Department (here, the Criminal Division) and any other government agencies affected by the decision (here, the Customs Bureau and the Coast Guard). The package of recommendations is then forwarded to the Office of the Solicitor General for its consideration and for the Solicitor General's decision. While the filing of a certiorari petition is authorized in fewer than 10% of the cases lost by the government in the courts of appeals, even a decision against

further review cannot be arrived at prior to the time by which a stay would have to be sought. The result of a rule that penalizes the government for failure to obtain a stay would be the encouragement of unnecessary stay applications, including many in cases in which no Supreme Court review is ultimately sought. Moreover, since denial of a stay would often be tantamount to the denial of further review, courts might feel obligated to conduct a more exhaustive review of the case than is customary at present before denying a stay application. In addition, some litigants whose applications were denied would be prompted to disobey lower court orders for the sole purpose of preserving their right to further judicial review.

We recognize that, because the judgment of the court of appeals did not impose any unwanted affirmative burden upon the United States, there was in this case no need to make the dismissal motion. But it would nevertheless be most inappropriate if the government's litigating rights were forfeited as a result of its understandable effort to aid the district court in determing the future course of any proceedings in that court. Accordingly, we urge the Court to reaffirm the rule of *Mancusi* v. *Stubbs* and to hold that action taken pursuant to the unstayed mandate of the court of appeals, even though it would end the controversy in the absence of further review, does not deprive this Court of power to review the judgment and is simply nullified in the event review is granted and the judgment that prompted the action is reversed.

REX E. LEE
Solicitor General

MARCH 1983

DOJ-1983-03

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

United States of America	*
	*
Versus	* Criminal
	* No. 80-20012-01/02
Jose Renaldo Villamonte-Marquez	*
and Robert Sortgese Hamparian	*

[Filed Dec. 21, 1981]

MOTION TO DISMISS INDICTMENT

NOW INTO COURT, through undersigned counsel, comes the United States of America, and based upon the denial of rehearing by the United States Court of Appeals for the Fifth Circuit, issued as mandate on December 8, 1981, the Government moves to dismiss the Indictment against defendants, and for both defendants to be remanded to the custody of the Immigration and Naturalization Service forthwith for deportation.

Respectfully submitted,

J. RANSDELL KENNE
United States Attorney

FRANKLIN W. DAWKINS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

United States of America	*	
	*	
Versus	*	Criminal
	*	No. 80-20012-01/02
Jose Renaldo Villamonte-Marquez	*	
and Robert Sortgese Hamparian	*	

[Filed Dec. 21, 1981]

ORDER

Considering the foregoing motion, IT IS HEREBY ORDERED that the Indictment be and it is hereby dismissed, and the Federal Correctional Institution officials at Texarkana, Texas are further ORDERED forthwith to remand defendants to the custody of the Immigration and Naturalization Service for deportation.

Done this 21st day of December, 1981 at Shreveport, Louisiana.

Tom Stagg
U. S. District Judge

Supplemental Respondent's Brief

No. 81-1350

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

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UNITED STATES OF AMERICA, Petitioner,

v.

JOSE REYNALDO VILLAMONTE-MARQUEZ and
ROBERT SORTGESE HAMPARIAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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5 Moore's Federal Practice ¶ 41.02[6] at 43 (2d ed. 1982) 8

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 280 (Wolfson & Kurland ed. 1951) 8

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STATEMENT OF THE CASE

On August 3, 1981, the judgment of the Fifth Circuit Court of Appeals was entered in this case, reversing the convictions of the respondents Hamparian and Villamonte-Marquez. The judgment of the court of appeals (Pet. App. 21a-22a) provided in pertinent part as follows:

> [I]t is now here ordered and adjudged by this court that the judgment of the district court be and the same is hereby reversed. It is further ordered that plaintiff-appellee pay to defendant-appellants the costs on appeal to be taxed by the clerk of this court.

On October 19, 1981, a suggestion for a rehearing en banc filed by the government was denied. The mandate of the court of appeals was then issued on October 29, 1981.

The government subsequently filed a Motion for Recall and Stay of the Issuance of the Mandate Pending Petition for Writ of Certiorari on November 13, 1981. On November 20, 1981, the court of appeals granted this motion, recalled the mandate and stayed it to and including 5 p.m., December 7, 1981. The stay was to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above-mentioned the government was required to file with the clerk of the court of appeals the certificate of the Clerk of the Supreme Court that the certiorari petition had been filed. The government failed to file a petition

for a writ of certiorari within the time provided by the stay. Consequently the mandate of the court of appeals was subsequently reissued as of December 8, 1981.

On December 21, 1981, the United States Attorney filed in the United States District Court for the Western District of Louisiana a motion to dismiss the indictment against respondents and to have the respondents remanded to the Immigration and Naturalization Service "forthwith" for deportation. The government's motion to dismiss the indictment was granted on December 21, 1981, by the district court, the Honorable Tom Stagg presiding. One day later, on December 22, 1981, Justice White extended the time within which the government was required to file a petition for a writ of certiorari to and including January 17, 1982 (a Sunday). The government's petition was subsequently filed on January 18, 1982, and was granted on June 7, 1982.

This Supplemental Brief is being filed by respondents in response to the Court's request for supplemental briefs on the question of the effect of the dismissal of the indictment on December 21, 1981.

ARGUMENT

POINT I

BECAUSE THE GOVERNMENT, UPON ITS OWN VOLUNTARY MOTION, OBTAINED A DISMI SAL OF THE INDICTMENT BY THE DISTRICT OURT AND THEREBY TERMINATED THE PROSECUTION AGAINST RESPONDENTS, THE GOVERNMENT NO LONGER HAS STANDING TO MAINTAIN THIS APPEAL.

It is well settled that a party to a criminal action cannot maintain an appeal if he is not "legally aggrieved" by the order appealed from. Lewis v. United States, 216 U.S. 611, 612 (1910; Commonwealth v. Graves, 112 Mass. 282, 283 (1873). Nor can a party appeal based on an issue arising in a potential later case, Ryan v. Commissioner of Internal Revenue, 680 F.2d 324, 326 (3d Cir. 1982), or in a possible future prosecution. See Parr v. United States, 351 U.S. 513, 517 (1956). In this case, the federal government has voluntarily terminated the prosecution against respondents Hamparian and Villamonte-Marquez by obtaining a dismissal of the indictment pending against the respondents in the district court below. See Fed. R. Crim. P. 48(a) ("The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate"). The dismissal concededly leaves respondents open to further prosecution by the return of another indictment within the statute of limitations. However, the government will not

be legally aggrieved by the Fifth Circuit's ruling concerning the admissibility of the marijuana seized during the boarding and search of the "Henry Morgan II" unless and until the respondents are reindicted and a pretrial motion to suppress is granted. Consequently, the government lacks standing to maintain the instant appeal.

That the government has no standing to appeal in this case can be seen from the Court's decisions holding that an accused lacks standing to appeal following the government's voluntary dismissal of the indictment. In Lewis v. United States, supra, the Court concluded that the accused could not appeal where the United States Attorney had entered a nolle prosequi in the district court, and no new indictment had been returned against the accused within the applicable statute of limitations. The Court determined that the accused was not "legally aggrieved" as he had been discharged from further prosecution under the indictment. 216 U.S. at 612. It further reasoned that "[t]he indictment having been dismissed, the question as to plaintiff in error's constitutional right to a speedy trial is not involved in such a real sense as to give the court jurisdiction." Id. at 613.

The holding in Lewis was adhered to and expanded upon by the Court in Parr v. United States, supra. The petitioner-accused in Parr was originally indicted in the

Corpus Christi Division of the United States District Court for the Southern District of Texas. After the petitioner successfully moved to transfer the case to the Laredo Division of the same court, the government obtained a new indictment against the petitioner in the Austin Division of the Western District of Texas. On the following day, the government moved to dismiss the first indictment under Fed. R. Crim. P. 48(a), which motion was granted.

The Court held that the petitioner's appeal from the dismissal of the original indictment would not lie. Viewing the Corpus Christi proceeding as a separate prosecution, the petitioner was found not to have been injured by its termination, the Court citing Lewis v. United States, supra. 351 U.S. at 516-17. Moreover, it made no difference that, unlike in Lewis, "the dismissal still leaves [Parr] open to further prosecution." Id. at 517. The Court rejected the suggestion that the defendant in Lewis had been held not aggrieved only because the statute of limitations prevented his reindictment, explaining the Lewis holding as follows:

> The Court alluded to that circumstance, however, only after holding that the defendant could not be "legally aggrieved" by being released from prosecution under the indictment; the bar of the statute of limitations was noted only in connection with a concluding observation that the case was moot in any event.

Id. at 517 n.8.

While Lewis and Parr involved appeals by criminal defendants, the government in this case can show no greater quantum of injury than the accused in those decisions. Once the government obtained a dismissal of the indictment against respondents under Fed. R. Crim. P. 48(a), the prosecution terminated. The government cannot seek to have the marijuana seized from respondents' sailboat admitted in a prosecution which is no longer pending. It therefore follows that the government no longer has any legal interest in the constitutional question which it has presented to this Court for adjudication. Of course, the government may suffer aggrievement sometime in the future if the respondents are reindicted and a motion to suppress is granted. However, the mere possibility of such future aggrievement does not amount to a present legal injury and cannot give the government standing to appeal at this time. Review of the Fifth Circuit's ruling on the admissibility of the marijuana must await the return of a new indictment against the respondents and the grant of a motion to suppress the marijuana. Cf. Parr v. United States, supra, 351 U.S. at 517 ("The testing of the effect of the dismissal order must abide petitioner's trial [on a second indictment], only then, if convicted, will he have been aggrieved").

Nor could a reversal by this Court of the judgment of the court of appeals operate to reinstate the original indictment. The mandate of the Fifth Circuit merely stated that the district court's judgment of conviction was "reversed" and did not contain instructions directing the district court to dismiss the indictment. A reversal of a judgment of conviction without a direction for dismissal of the indictment sets aside the judgment but allows the indictment to stand. Spriggs v. United States, 225 F.2d 865, 868 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956); United States v. Reina, 172 F. Supp. 113, 116 (S.D.N.Y. 1959). See also Ball v. United States, 163 U.S. 662, 672 (1896) ("[I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted"). Thus, the dismissal of the indictment was not required by the Fifth Circuit's mandate and was only subsequently obtained upon a voluntary motion of the government made under Fed. R. Crim. P. 48(a). Such voluntary action cannot be reached by a reversal of the Fifth Circuit's judgment.

In short, just as a plaintiff in a civil action lacks standing to appeal an order entered in the action once it has voluntarily dismissed its complaint, Pipeliners Local

Union No. 798 v. Ellerd, 503 F.2d 1193, 1199-1200 (10th Cir. 1974); 5 Moore's Federal Practice ¶ 41.02[6] at 43 (2d ed. 1982); see Fed. R. Civ. P. 41(a), the government has no standing to maintain this appeal of a judgment entered in a criminal action following the dismissal of the indictment upon the government's voluntary motion.

POINT II

AS THE GOVERNMENT'S ACTION IN OBTAINING A DISMISSAL OF THE INDICTMENT TERMINATED THE CRIMINAL PROCEEDINGS BELOW, THIS CASE IS MOOT.

It is well established that "[an] appeal by the government in criminal cases falls if, during its pendency, a nolle prosequi is entered in the lower court." Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 280 at 510 (Wolfson & Kurland ed. 1951). In United States v. Phillips, 31 U.S. (6 Pet.) 776 (1832), involving an appeal by the government of a criminal action, the United States Attorney General informed the Court that a nolle prosequi had been entered in the lower court pursuant to instructions from then President Andrew Jackson. Upon being informed of this fact, the Court, on the motion of the Attorney General, dismissed the cause as moot.[1] Similarly, the instant

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[1] While the Phillips opinion did not expressly state that the case was mooted by the entry of a nolle prosequi, it has been consistently interpreted as so holding by legal commentators. Robertson & Kirkham, § 280 at 510 & n.5; Diamond, "Federal Jurisdiction to Decide Moot Cases," 94 U. Pa. L. Rev. 125, 126 n.9 (1946).

case must be dismissed as moot, because the federal government has voluntarily terminated the prosecution against respondents by procuring a dismissal of the indictment in the district court below pursuant to Fed. R. Crim. P. 48(a).

This Court has similarly held that an appeal from a condemnation decree in favor of the United States must be treated as moot upon the abandonment of the proceedings by the government. C.M. Patten & Co. v. United States, 289 U.S. 705 (1933); Robertson & Kirkham, supra, § 280 at 510 & n.3. In addition, a plaintiff's voluntary abandonment of a claim in a civil action leaves no actual controversy to support a judicial declaration regarding the abandoned claim. Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 140-41 (D.C. Cir), cert. denied, 421 U.S. 1004 (1974). Because the government in this case has voluntarily dropped the prosecution of respondents, no actual controversy exists and the case is therefore moot.

CONCLUSION

The government's voluntary action in obtaining a dismissal of the indictment has left the government with no legal interest in obtaining a reversal of the Fifth Circuit's judgment by this Court. Thus, the government lacks standing to maintain this appeal, and the writ of

certiorari must be dismissed as improvidently granted. In the alternative, should this Court find that the government's filing of a dismissal of the indictment pursuant to Fed. R. Crim. P. 48(a) moots the case, the judgment of the Fifth Circuit must be vacated and the cause remanded to the district court with directions to vacate its judgment of conviction and to dismiss the criminal proceeding upon the ground that the case is moot.

Respectfully submitted,

Richard P. Ieyoub
Attorney for Respondents

Docket Sheet

{SHOW }

PROCEEDINGS AND ORDERS DATE: 031783

CASE NBR 81-1-01350 CFY
SHORT TITLE United States DOCKETED: Jan 18 1982
VERSUS Villamonte-Marquez, et al.

Date	Proceedings and Orders
Sep 7 1982	Record filed.
Sep 7 1982	Certified original record and C.A. proceedings received.
Sep 13 1982	Order extending time to file respondents' brief on the merits until November 9, 1982.
Nov 9 1982	Brief of respondent Jose Reynaldo Villamonte-Marquez, et al. filed.
Dec 14 1982	CIRCULATED.
Jan 19 1983	SET FOR ARGUMENT. Wednesday, February 23, 1983. (3rd case)
Feb 9 1983	Reply brief of petitioner United States filed.
Feb 23 1983	ARGUED.
Feb 23 1983	(Supplemental memorandum to come.)
Mar 11 1983	Supplemental brief of respondent Jose Reynaldo Villamonte, et a filed.
Mar 11 1983	Supplemental brief of respondent not to be printed.

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 031783

CASE NBR 81-1-01350 CFY
SHORT TITLE United States DOCKETED: Jan 18 1982
VERSUS Villamonte-Marquez, et al.

Date	Proceedings and Orders
Mar 15 1983	Supplemental brief of petitioner filed.

{SHOW } PROCEEDINGS AND ORDERS DATE: 031783

CASE NBR 81-1-01350 CFY
SHORT TITLE United States DOCKETED: Jan 18 1982
VERSUS Villamonte-Marquez, et al.

Date	Proceedings and Orders
Dec 18 1981	Application for extension of time to file petition and order granting same until January 17, 1982 (White, December 18, 1981).
Jan 18 1982	Petition for writ of certiorari filed.
Feb 24 1982	DISTRIBUTED. March 19, 1982
Mar 9 1982	Response requested. (Due April 8, 1982 - NONE RECEIVED)
Mar 26 1982	Order extending time to file response to petition until May 3, 1982.
Apr 26 1982	Order further extending time to file response to petition until May 8, 1982.
May 7 1982	Brief of respondents Jose Reynaldo Villamonte-Marquez, et al. in opposition filed.
May 7 1982	Motion of respondents for leave to proceed in forma pauperis filed.
May 12 1982	DISTRIBUTED. May 27, 1982

CONTINUE {
{SHOW } PROCEEDINGS AND ORDERS DATE: 031783

CASE NBR 81-1-01350 CFY
SHORT TITLE United States DOCKETED: Jan 18 1982
VERSUS Villamonte-Marquez, et al.

Date	Proceedings and Orders
May 24 1982	Reply brief of petitioner filed.
Jun 1 1982	REDISTRIBUTED. June 3, 1982
Jun 7 1982	Petition GRANTED.
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Jun 7 1982	Motion of respondents for leave to proceed in forma pauperis GRANTED.
Jul 20 1982	Order extending time to file petitioner's brief on the merits until August 21, 1982.
Aug 20 1982	Joint appendix filed.
Aug 20 1982	Order further extending time to file petitioner's brief on the merits until August 28, 1982.
Aug 31 1982	Brief of petitioner filed.
Aug 20 1981	Application by Solicitor General for leave to file brief in excess of page limitations, and order denying same
Aug 20 1982	by White, J., 8/20/82.